The Limits of the Due Process Protocols

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I. INTRODUCTION

Those familiar with federal arbitration law are undoubtedly familiar with the various due process protocols that have evolved over the last eight years. The first protocol, *Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship* (hereinafter *Employment Protocol*), was created in 1995 by a task force of "individuals from diverse organizations involved in labor and employment law"[1] and served as the model for the *Due Process Protocol for Consumer Disputes* (hereinafter *Consumer Protocol*) and for the *Health Care Due Process Protocol* (hereinafter *Health Care Protocol*), both created in 1998.[2] Although the protocols differ in some significant ways, they all seek to ensure a minimally fair process for disputants by providing standards and procedures that should be followed by arbitrators and arbitration service providers in the conduct of the arbitrations to which they relate. All three protocols also recognize the role that arbitration and mediation can play in the resolution of various conflicts involving employees, consumers, and health care participants.[3]

The protocols have had a tremendous impact on arbitration; in many ways, they have changed the face of arbitration of statutory employment disputes and consumer disputes. Most significantly, this has occurred because major arbitration service providers have agreed to follow the protocols and have drafted rules consistent with the principles of the

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[1] JOHN T. DUNLOP & ARNOLD M. ZACK, MEDIATION AND ARBITRATION OF EMPLOYMENT DISPUTES 171 (1997). The *Employment Protocol* can be found in Appendix B, at 171–78.

[2] *Due Process Protocol for Consumer Disputes: A Due Process Protocol for the Mediation and Arbitration of Consumer Disputes*, PROGRAM BOOK (Comm'n on Health Care Disp. Resol., ABA Section on Disp. Resol., Wash., D.C.), Apr. 30, 1999, at 43; *Health Care Due Process Protocol: A Due Process Protocol for Mediation and Arbitration of Health Care Disputes*, PROGRAM BOOK (Comm'n on Health Care Dispute Resolution, ABA Section on Disp. Resol., Wash., D.C.), Apr. 30, 1999, at 1.

[3] This Article will focus exclusively on the provisions of the protocols relating to arbitration.

protocols for the conduct of any arbitration governed by the protocols.[4] The protocols' impact can be seen in other contexts as well. For example, the protocols have acted as guideposts for various courts called upon to determine the enforceability of a particular arbitration scheme.[5] Congressional efforts to amend the Federal Arbitration Act (FAA) have also been influenced by the protocols; various amendments have been proposed that have sought to codify the standards set forth in the protocols for the conduct of certain arbitration proceedings.[6] In addition, state arbitration law may be affected by the protocols when a state considers the Revised Uniform Arbitration Act (RUAA), which has been influenced, to some degree, by the due process standards contained in the protocols.[7]

Although the protocols have had an impact on arbitration, they do not have the force of law. They were developed by task forces and advisory committees composed of various groups, including the arbitration industry, interested in the resolution of disputes concerning employment, consumer, and health care issues. The effectiveness of the protocols thus lies in the voluntary agreement by arbitrators and arbitration service providers to require adherence to the procedures called for in the protocols for the administration and conduct of an arbitration proceeding. By voluntarily agreeing to adhere to the requirements of the protocols, those providing arbitration services have essentially agreed to regulate themselves.[8] As a self-

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[4] *See infra* notes 183–196 and accompanying text (discussing the voluntary adoption by the major arbitration service providers of the principles set forth in the protocols).

[5] *See infra* notes 228–256 and accompanying text (discussing how the standards set forth in the protocols may influence judicial resolution of claims regarding the enforceability of a certain arbitration agreements).

[6] *See infra* notes 258–261 and accompanying text (discussing proposed amendments to federal law requiring adherence to due process standards contained in the *Employment Protocol*).

[7] *See infra* notes 262–274 and accompanying text (discussing the RUAA); *see also* Thomas J. Stipanowich, *Contract and Conflict Management*, 2001 WIS. L. REV. 831, 894 (discussing how drafters of the RUAA cite protocols as guideposts to determine unconscionability of arbitration agreements).

[8] As will be discussed *infra*, there is little governmental regulation of the arbitration industry; accordingly, any attempt by the industry to control its own behavior is self-regulatory. The early self-regulatory attempt by labor arbitrators is described by Mr. Zack:

> And most of all [arbitrators and the union and management advocates] shared a joint commitment to develop a private system of conflict resolution to protect the rights of the parties through due process. They were building a system which would demonstrate to the grievants, the parties, the public, and the courts that self-regulation was workable, acceptable to all the participants, and worthy of acceptance and respect as a credible judicial institution.

regulatory effort, the protocols seek to infuse arbitration with certain due process protections, thereby filling the procedural gap that was created when the United States Supreme Court endorsed the use of arbitration for the resolution of statutory claims. They also seek to encourage and promote the use of alternative dispute resolution for certain disputes. By committing itself to ensuring that due process protections are provided, the arbitration industry's decision to regulate itself may have helped to legitimize the prevalent and growing use of pre-dispute arbitration clauses in contracts of adhesion. It may also have been instrumental in fending off more direct government regulation of the arbitration industry and in maintaining the favored status the Supreme Court has bestowed upon arbitration.

Irrespective of the desirability of those achievements, it is an open question whether those achievements are well earned by the industry's self-regulatory effort. The efficacy of self-regulation to control the conduct of members or firms in an industry or profession in a manner consistent with the public interest and with the standards adopted by the industry is also open to question. Self-regulation generally has a "tarnished image."[9] Opponents of self-regulation tend to view such regulation as a "sham—a cynical attempt by self-interested parties to give the appearance of regulation (thereby warding off more direct government intervention) while serving private interests at the expense of the public."[10] Proponents, however, believe that self-regulation is preferable to government command and control regulation because it is more efficient—standards are created by industry experts, and are thus more flexible and practicable, which leads to more effective policing.[11] As will be discussed, some of the concerns raised by typical industry self-regulation are not implicated to the same degree by the arbitration industry's creation and adoption of the due process protocols. Unlike industry self-regulation, where only members of the industry play a role in the formation of the governing standards, the protocols were developed not only by firms in the industry but also by others who had an interest and a stake in the formation of due process standards. Accordingly, the drafting committees and task forces responsible for the protocols were not clearly dominated by the industry. This factor helps the protocols avoid

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Arnold Zack, *Dissemination and Enforcement of the Code of Ethics*, *in* ARBITRATION 1988 EMERGING ISSUES FOR THE 1990S, PROCEEDINGS OF THE 41ST ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS 216, 216 (Gladys W. Gruenberg ed., 1989).

[9] Neil Gunningham, *Environment, Self-Regulation, and the Chemical Industry: Assessing Responsible Care*, 17 LAW & POL'Y 57, 58 (1995).

[10] *Id.*

[11] *Id.*

the categorical "sham" label and gives them a greater chance of success in gaining credibility than exists for typical industry self-regulation.

The fact that the protocols did not originate solely within the industry does not mean that the industry's agreement to follow the protocols will be effective in meeting the goals of the protocols. For any self-regulatory effort to succeed, provisions must exist to monitor individual firms' compliance with the protocols and to sanction noncompliance when discovered. Such monitoring and enforcement provisions are absent in each of the protocols. The absence of such provisions threatens to undermine the efficacy of the self-regulatory effort. The lack of such provisions makes it impossible to determine if the due process protocols are in fact being followed by individual arbitrators and arbitration service providers in actual cases. This deficiency is significant, not only for the obvious reason that it may mean that disputants are being deprived of essential due process protections in the arbitral forum, but also because it may impact the willingness of certain providers to adhere to the protocols. Such providers may be reluctant to follow the due process standards and reject cases that violate the protocols because they cannot be assured that others are following the same rules. This is a significant impact because the existence of the protocols and the agreement by providers to follow the protocols has helped restore the public's perception of arbitration, leading some to believe that all disputants are given a level playing field in the arbitral process. Accordingly, the existence of free-riders—those who do not conform to the protocols but who nonetheless benefit from the reputational enhancement the protocols have given arbitration and from the lack of direct government regulation—can seriously weaken the efficacy of the regulation. Thus, monitoring and enforcement provisions that identify and deter free-riders are essential if the protocols are to succeed in regulating the conduct of the arbitration industry. Without such provisions, the benefits sought by the self-regulatory effort will be unattainable.

The purpose of this Article is to evaluate the effectiveness of the protocols as self-regulatory instruments and to suggest ways that such effectiveness can be improved. The effectiveness of the protocols cannot be analyzed, however, without an understanding of the goals the drafters of the protocols hoped to achieve when the protocols were created. Accordingly, Part II of this Article will detail the origins of the protocols. The factors that motivated their creation, endorsement, and adoption by the arbitration industry and their intended role in promoting arbitration as an alternative to judicial resolution of disputes will be highlighted. That discussion will demonstrate how the Supreme Court's decision in *Gilmer v.*

Interstate/Johnson Lane Corp.,[12] the findings of the Dunlop Commission, and the unilateral imposition of arbitration clauses in employment, consumer, and health care contracts contributed to the formation of the protocols. The sources of the due process standards articulated in the protocols will also be discussed. Part II concludes with a discussion of some of the more significant effects the protocols have had on arbitration law and practice.

Part III of this Article will analyze and critique the protocols as self-regulatory instruments. The use of the protocols to control collective action by firms and individuals in the arbitration industry will be described, and the success of the protocols for achieving collective benefits will be discussed. The adequacy of the standards will be analyzed from a number of perspectives, including their ability to overcome the inevitable credibility obstacle all self-regulatory efforts encounter, to obtain commitments from firms in the industry, and to prevent free-riders from undermining the efficacy of the protocols. Part III will conclude with suggestions for how the protocols' effectiveness can be enhanced. The suggestions will focus on the inclusion of monitoring and sanctioning provisions and will describe how inclusion of such provisions can benefit both the industry and the public.

II. THE EMERGENCE AND IMPACT OF THE PROTOCOLS

A. *Origins*

A confluence of factors led to the creation of the first protocol, the *Employment Protocol*.[13] The *Gilmer* decision made it apparent that due process protections were needed when statutory employment claims were arbitratable. This led commentators to call upon both the judiciary and the legislature to impose such standards.[14] However, the work of the Commission on the Future of Worker-Management Relations, chaired by John T. Dunlop[15] (the "Dunlop Commission") appears to have been the

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[12] Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991).

[13] The factors that led to the creation of the *Employment Protocol* are also significant to an understanding of the origins of the *Consumer* and the *Health Care Protocols*.

[14] *See, e.g.*, Robert A. Gorman, *The* Gilmer *Decision and the Private Arbitration of Public-Law Disputes*, 1995 U. ILL. L. REV. 635, 639, 660–665; Lewis Maltby, *Paradise Lost—How the* Gilmer *Court Lost the Opportunity for Alternative Dispute Resolution to Improve Civil Rights*, 12 N.Y.L. SCH. J. HUM. RTS. 1, 10–11 (1994).

[15] Professor Dunlop was the Secretary of Labor from 1975 to 1976. *See* http://www.labor.gov/asp/programs/history/dunlop.htm (last visited Sept. 26, 2003).

impetus for the crafting of the *Employment Protocol* as a self-regulatory instrument.[16]

The *Gilmer* decision[17] lies at the heart of the Commission's work and the protocols. Without the Supreme Court's endorsement of arbitration for statutory employment disputes, the Commission could not have recommended private arbitration as a means for remedying the judicial and administrative failures found in connection with claims alleging employment discrimination. Conversely, the Commission's work with respect to the development of standards that should be followed in the private arbitration of employment disputes, which helped form the basis of the *Employment Protocol*, would not have been necessary if the *Gilmer* Court had articulated the necessary standards for the arbitration of such a dispute. Accordingly, any discussion of the origins of the protocols must start with *Gilmer*.

1. *Gilmer v. Interstate/Johnson Lane Corp.*[18]

The Supreme Court in *Gilmer* was called upon to determine whether a claim brought pursuant to the Age Discrimination in Employment Act (ADEA) could be subjected to arbitration in accordance with an arbitration clause contained in a "Uniform Application for Securities Industry Registration or Transfer" (U-4).[19] Completion of the U-4, which registered Gilmer as a securities representative with, among others, the New York Stock Exchange (NYSE), was a condition of Gilmer's employment.[20] According to the U-4 and the applicable stock exchange rules, Gilmer's

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[16] *See, e.g.*, Michael Z. Green, *Debunking the Myth of Employer Advantage From Using Mandatory Arbitration for Discrimination Claims*, 31 RUTGERS L.J. 399, 425 (2000).

[17] Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 20 (1991).

[18] *Id.*

[19] The Supreme Court found that the U-4 application signed by Gilmer was not an employment contract. That finding permitted the Court to avoid the issue of whether arbitration clauses in employment contracts were enforceable under the FAA. *Id.* at 25 n.2. Section 1 of the FAA exempts from its coverage " . . . contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1 (1994). The Court did eventually reach the issue of the scope of section 1's exemption. In *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 109 (2001), the Court held that employment contracts were covered by the FAA unless the employment agreement covered workers engaged in transportation.

[20] *Gilmer*, 500 U.S. at 23.

employment claim against his employer was subjected to arbitration at the NYSE in accordance with NYSE arbitration rules.[21]

Although the Court had previously determined that claims based on violation of federal statutory law could be arbitrated,[22] Gilmer argued that claims based on the ADEA were not arbitrable because compulsory arbitration was inconsistent with the purposes of the ADEA.[23] In support, Gilmer focused on the procedures of the arbitral forum in which his claim would be heard and the fact that unequal bargaining power existed between himself, the employee, and his employer, who required arbitration as a condition of employment.

Gilmer's concerns about arbitral procedures were not unfounded and, in some respect, echoed concerns the Court itself had raised regarding arbitration of employment discrimination claims. Prior to *Gilmer*, the Court had determined that employees covered by collective bargaining agreements could bring Title VII claims in federal court after they had submitted their claims to final arbitration under the nondiscrimination clause of their collective bargaining agreement.[24] In *Alexander v. Gardner-Denver Co.*,[25]

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[21] *Id.* The NYSE has since abandoned its practice of requiring its registered representatives to arbitrate their employment discrimination claims against their employers, although an individual employer may still require arbitration of such claims. *See infra* note 196 and accompanying text.

[22] *See, e.g.*, Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 481 (1989) (raising a claim based on, among other things, Securities Act of 1933); Shearson/American Express Inc. v. McMahon, 482 U.S. 220, 238 (1987) (raising claims based on Securities Exchange Act of 1934 and the Racketeer Influenced and Corrupt Organizations Act); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 633 (1985) (raising a claim based on the Sherman Act).

[23] In determining the arbitrability of a claim, the Court looks to whether Congress intended to preclude waiver of a judicial forum for the particular statutory claim. *Gilmer*, 500 U.S. at 26. Congress's intent can be found in the text of the statute, its legislative history, or an inherent conflict between the statute's purpose and arbitration. *Id.* Gilmer relied only on the inherent conflict argument in support of his position that claims based on the ADEA are not arbitrable. *Id.* at 26–27.

[24] *See* Alexander v. Gardner-Denver Co., 415 U.S. 36, 49–50 (1974); *see also* McDonald v. West Branch, 466 U.S. 284, 290 (1984) (noting that because an arbitration proceeding cannot provide an adequate substitute for a judicial trial, a federal court is not permitted to give an unappealed grievance arbitration award preclusive effect in a § 1983 action brought in federal court); Barrentine v. Arkansas-Best Freight Sys., Inc., 450 U.S. 728, 743 (1981) (holding that an employee not precluded from bringing claim in federal court based on violation of Fair Labor Standards Act (FLSA) after having unsuccessfully brought claim to a joint grievance committee pursuant to collective bargaining agreement because, in part, "arbitrators may not be conversant with the public law considerations underlying the FLSA").

[25] *Alexander*, 415 U.S. at 36.

the Court stated that arbitration was an "inappropriate forum for the final resolution of rights created by Title VII."[26] In addition to questioning the competency of arbitrators to handle Title VII claims,[27] the Court also took issue with typical arbitration procedures. It stated:

> Moreover, the factfinding process in arbitration usually is not equivalent to judicial factfinding. The record of the arbitration proceedings is not as complete; the usual rules of evidence do not apply; and rights and procedures common to civil trials, such as discovery, compulsory process, cross-examination, and testimony under oath, are often severely limited or unavailable. And . . . arbitrators have no obligation to the court to give their reasons for an award. [28]

Gilmer was unable to persuade the Court to continue to follow *Gardner-Denver* and its progeny.[29] The Court held that Gilmer had not carried his burden of showing that arbitration of an ADEA claim, pursuant to the NYSE arbitration rules, would be in conflict with the ADEA's underlying purposes.[30]

With respect to unequal bargaining power, the Court held that "[m]ere inequality in bargaining power . . . is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context."[31] In support, the Court noted that it had previously upheld arbitration of claims brought by investors against their securities dealers, which relationship may also involve unequal bargaining power.[32] While recognizing that courts "should remain attuned to well-supported claims that the agreement to arbitrate resulted from the sort of fraud or overwhelming economic power that would provide grounds for the revocation of any contract," the Court found no indication that Gilmer was either coerced or defrauded into agreeing to the arbitration clause.[33] The fact that Gilmer had no choice but to agree to the clause was not specifically discussed by the Court.

The Court rejected each argument made by Gilmer concerning the procedural inadequacies of the arbitral forum, either on the basis that the rules were sufficient or on the basis that the Court had previously rejected

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[26] *Id.* at 56.

[27] Arbitrators' specialized competency "pertains primarily to the law of the shop, not the law of the land." *Id.* at 57.

[28] *Id.* at 57–58 (citations omitted).

[29] *See supra* note 24.

[30] Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 27–28 (1991).

[31] *Id.* at 33.

[32] *Id.*

[33] *Id.* (citation omitted).

such a challenge.[34] Gilmer challenged the potential partiality of the arbitrators, the adequacy of discovery, the lack of written opinions by the arbitrators, the limited judicial review of arbitration decisions, and the insufficiency of equitable relief.[35]

With respect to Gilmer's concern about potential bias, without a specific showing that the NYSE "provisions [were] inadequate to guard against potential bias," the Court refused to "indulge the presumption that the parties and arbitral body conducting a proceeding will be unable or unwilling to retain competent, conscientious and impartial arbitrators."[36] The Court also found that the NYSE arbitration rules and the FAA protect against bias.[37]

The fact that discovery in a NYSE arbitration was not as extensive as that available in federal court also did not persuade the Court to find arbitration inadequate to protect Gilmer's rights.[38] The Court first noted that it had upheld claims based on other statutory rights where the discovery needs would likely be similar to the discovery needs for an ADEA claim.[39] The Court stated that "[i]t is unlikely . . . that age discrimination claims require more extensive discovery than other claims that we have found to be arbitrable, such as RICO and antitrust claims."[40] The Court then noted that the NYSE rules do in fact permit certain discovery and that Gilmer had not asserted that those particular discovery provisions were "insufficient to allow ADEA claimants . . . a fair opportunity to present their claims."[41]

Gilmer asserted that the lack of a written opinion by the arbitrators made arbitration inadequate to further the purposes of the ADEA for a number of reasons: the public would not learn of the discriminatory practices of an employer, the development of ADEA law would be retarded, and appellate review of the arbitrators' decision would be detrimentally impacted.[42]

The Court first noted that the NYSE arbitration rules did, in fact, require a written award which was made available to the public.[43] The written award

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[34] *Id.* at 30–32.

[35] *Id.*

[36] *Gilmer*, 500 U.S. at 30–31 (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 634 (1985)).

[37] *Id.*

[38] *Id.* at 31.

[39] *Id.*

[40] *Id.*

[41] *Gilmer*, 500 U.S. at 31. The Court also noted that the evidentiary rules are inapplicable in an arbitration proceeding to counterbalance the reduced discovery that is available to the parties.

[42] *Id.* at 31.

[43] *Id.* at 31–32.

included a summary of the issues and a description of the award issued.[44] The Court was not concerned that ADEA law would stagnate by making ADEA claims subject to arbitration because "it is unlikely that all or even most ADEA claimants will be subject to arbitration agreements."[45] The concern raised by Gilmer regarding the impact on the public of arbitration of ADEA claims was not shared by the Court inasmuch as those concerns "apply equally to settlements of ADEA claims, which . . . are clearly allowed."[46]

The Court addressed Gilmer's concern about the limited judicial review of arbitration awards by merely noting that it had previously rejected this argument by finding that "'such review is sufficient to ensure that arbitrators comply with the requirements of the statute at issue.'"[47]

Gilmer's final challenge to the arbitration procedure concerned the lack of a provision for "broad equitable relief and class actions."[48] Because arbitrators under NYSE rules had the "power to fashion equitable relief," and the NYSE rules contained provisions for "collective proceedings," the Court rejected the challenge.[49] The Court also noted that the Equal Employment Opportunity Commission (EEOC) would not be precluded under an arbitration agreement from bringing its own action "seeking class-wide and equitable relief."[50]

After finding the NYSE arbitral process adequate for the vindication of an ADEA claim, the Court explained why it declined to follow the *Gardner-Denver* line of cases.[51] First, the Court noted that the mistrust expressed by the Court in those cases "[had] been undermined by [its] recent arbitration decisions."[52] In support, the Court cited to *McMahon* and *Mitsubishi*, where it had upheld arbitration of claims based on the Securities Exchange Act of 1934 and on the Sherman Act, respectively.[53] In *Gilmer*, the Court

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[44] *Id.*

[45] *Id.* at 32.

[46] *Id.*

[47] *Gilmer*, 500 U.S. at 32 n.4 (quoting Shearson/American Express Inc. v. McMahon, 482 U.S. 220, 232 (1987)).

[48] *Id.* at 32.

[49] *Id.*

[50] *Id.* In EEOC. v. Waffle House, Inc., 534 U.S. 279, 291–92 (2002), the Supreme Court upheld the EEOC's right to bring an enforcement action seeking victim-specific relief for violation of the Americans with Disabilities Act on behalf of an employee who had agreed to arbitrate any dispute or claim he had with his employer concerning his employment.

[51] *Gilmer*, 500 U.S. at 33–35.

[52] *Id.* at 34 n.5.

[53] *Id; see supra* note 22.

apparently did not see a reason to treat arbitration of a claim based on a violation of a civil rights statute any differently than it treated arbitration of the federal claims at issue in *McMahon* and *Mitsubishi*, which arose from commercial transactions.[54] Contrary to the Court, one commentator has articulated an important reason for treating statutory employment and commercial claims differently:

> One of the distinguishing factors between the employment and commercial cases is that statutory civil rights laws have been promulgated, at least in part, to protect interests that we deem important to society. Thus, when a decision is rendered on a civil rights claim, its effect is felt by society as a whole. In contrast, decisions on commercial claims generally affect only the parties to the litigation.[55]

The Court then distinguished the *Gardner-Denver* line of cases on several grounds.[56] The issue in those cases, the Court pointed out, was different than the issue in *Gilmer*. *Gilmer* involved the enforceability of an arbitration agreement, whereas the *Gardner-Denver* cases involved the issue of "whether arbitration of contract-based claims precluded subsequent judicial resolution of statutory claims."[57] In addition, arbitration in the *Gardner-Denver* line of cases occurred because the collective bargaining agreements required it and the employees were represented by their unions.[58] Thus, a "tension" existed "between collective representation and individual statutory rights," which was absent in *Gilmer*.[59] Lastly, the Court stated that Gilmer's case was governed by the FAA and its "liberal federal policy favoring arbitration agreements," which was inapplicable to the collective bargaining arbitration cases.[60]

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[54] *See* Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, 73 DENV. U. L. REV. 1017, 1030–31 (1996) ("The *Gilmer* Court's reasoning was based on a series of recent Supreme Court cases about commercial arbitration under the FAA.").

[55] Leona Green, *Mandatory Arbitration of Statutory Employment Disputes: A Public Policy Issue in Need of a Legislative Solution*, 12 NOTRE DAME J.L. ETHICS & PUB. POL'Y 173, 177 (1998) (citations omitted).

[56] *Gilmer*, 500 U.S. at 35. See Theodore J. St. Antoine, Gilmer *in the Collective Bargaining Context*, 16 OHIO ST. J. ON DISP. RESOL. 491, 494–495 (2001) for a discussion of additional distinctions between *Gardner-Denver* and *Gilmer*.

[57] *Gilmer*, 500 U.S. at 35.

[58] *See id.*

[59] *Id.* Gilmer was not a member of a union and the arbitration clause was not contained in a collective bargaining agreement.

[60] *Id.* (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 625 (1985)).

The *Gilmer* decision "set in motion one of the most dramatic shifts in the governance of employment relations of recent times,"[61] and it is significant for a number of reasons. First, it upheld mandatory arbitration of a claim based on a federal employment statute. Second, it found the NYSE arbitration procedures sufficient for Gilmer to adequately vindicate his statutory rights. These findings have been thoroughly critiqued by numerous scholars.[62] The critiques will not be repeated here except to note that one commentator, who, generally believing that *Gilmer* could be a "blessing" to employees by providing them with "meaningful access to justice," also feared that *Gilmer* could force "employees to take their complaints to tribunals that are no better than kangaroo courts."[63]

Gilmer, however, left many questions open, some of which have since been answered by the Court[64] and others that await answers. Some of the more significant questions that remain are: (i) the arbitrability of claims based on other civil rights statutes;[65] (ii) *Gilmer*'s application to union employees and its impact on *Gardner-Denver* where the arbitration clause is contained in a collective bargaining agreement and explicitly covers claims based on federal civil rights statutes;[66] (iii) the kind of consent that is needed

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[61] Alexander J.S. Colvin, *The Relationship Between Employment Arbitration and Workplace Dispute Resolution Procedures*, 16 OHIO ST. J. ON DISP. RESOL. 643, 643 (2001).

[62] *See, e.g.*, Reginald Alleyne, *Statutory Discrimination Claims: Rights "Waived" and Lost in the Arbitration Forum*, 13 HOFSTRA LAB. L.J. 381 (1996); David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33; Stone, *supra* note 54, at 1017.

[63] Maltby, *supra* note 14, at 2–3.

[64] *See supra* notes 19 (discussing Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001)) and 50 (discussing E.E.O.C. v. Waffle House, Inc., 534 U.S. 279 (2002)).

[65] Lower courts have overwhelmingly found claims based on Title VII arbitrable. *See, e.g.*, Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 170 F.3d 1 (1st Cir. 1999); Koveleskie v. SBC Capital Mkts., Inc., 167 F.3d 361 (7th Cir. 1999); Seus v. John Nuveen & Co., 146 F.3d 175 (3d Cir. 1998); Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465 (D.C. Cir. 1997). Indeed, the Ninth Circuit has just recently joined those circuits; *see* E.E.O.C. v. Luce, Forward, Hamilton & Scripps, 303 F.3d 994 (9th Cir. 2002), *reh'g en banc granted*, 319 F.3d 1091 (9th Cir. 2003).

[66] The Supreme Court dodged this question in *Wright v. Universal Mar. Serv. Corp.*, 525 U.S. 70 (1998). There, the Court declined to reach the issue of whether a union-negotiated waiver of an employee's statutory right to a judicial forum for an employment discrimination claim would be enforceable after *Gilmer* because it found the arbitration clause too general to meet the standard for a "clear and unmistakable" waiver. *Id.* at 80–81.

Most courts that have considered the issue have held that *Gilmer* does not supercede the holding of *Gardner-Denver*. *See* St. Antoine, *supra* note 56, at 495–96 (discussing

to bind an employee to a pre-dispute arbitration agreement;[67] and (iv) the minimum procedural standards that must exist to ensure the adequate vindication of an employee's statutory rights. Lower courts and legal scholars have grappled with these open issues since the *Gilmer* decision.[68]

It is, of course, the last open question that led to the development of the protocols. While the Supreme Court found the NYSE procedures sufficient to uphold arbitration of the ADEA claim, it did not explicitly hold that those, or similar procedures, were in fact necessary or required in order for a claimant to be compelled to arbitrate a claim based on the ADEA or another employment related statute. Nor did the Court give any guidance as to the minimum procedures, if any, that must be present for a claimant to adequately vindicate his or her statutory rights in the arbitral forum.

The only insight the Court has provided since *Gilmer*, arguably related to the procedures of the arbitral forum, can be found in *Green Tree Financial Corp.-Alabama v. Randolph.*[69] There, a consumer claimed that an arbitration agreement, requiring her to arbitrate claims based on the Truth in Lending Act against a financing company, was unenforceable because the agreement was silent with respect to payment of arbitral filing fees and other costs and expenses.[70] Although the Supreme Court declined to find the agreement unenforceable on that basis alone, it nevertheless stated that "the existence of large arbitration costs could preclude a litigant . . . from effectively

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status of law and noting that the Fourth Circuit "stands alone in concluding that *Gilmer* has superseded *Gardner-Denver* even with [respect] to collective bargaining agreements").

[67] *See* St. Antoine, *supra* note 56, at 497 n.33 ("The federal courts have used at least three different approaches to the necessary state of mind for holding an employee bound by an agreement to arbitrate.").

[68] *See, e.g.*, Martin H. Malin, *Privatizing Justice—But By How Much? Questions* Gilmer *Did Not Answer*, 16 OHIO ST. J. ON DISP. RESOL. 589, 592 (2001) (discussing fallout from *Gilmer* that lower courts have addressed).

At least one commentator has noted that *Gilmer*, by addressing the procedural safeguards contained in the NYSE arbitration rules, did in fact establish the procedural minimums that must be present in order for the arbitral forum to satisfactorily enforce the statutory rights at issue. *See* Gorman, *supra* note 14, at 645. However, Professor Stone has noted that lower courts were not reading *Gilmer* as establishing the NYSE arbitration rules "as a precondition to enforcing an employment law arbitration." Stone, *supra* note 54, at 1044. Rather, she notes that courts were upholding arbitration of statutory claims without regard to the procedures applicable in the arbitration. *See id.*

[69] Green Tree Fin. Corp.- Ala. v. Randolph, 531 U.S. 79 (2000).

[70] *See id.* at 83–84.

vindicating her federal statutory rights in the arbitral forum."[71] Although it is clear that arbitral costs cannot be so expensive as to bar a claimant from proceeding in the arbitral forum, the Court did not provide any guidance to determine when that is the case. That exact issue has been the subject of much litigation in the lower courts.[72]

The FAA is also silent as to specific procedures that must be present in order for a court to compel arbitration of a civil rights claim.[73] Indeed, the Supreme Court has previously stated that "[t]here is no federal policy favoring arbitration under a certain set of procedural rules; the federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate."[74] Under that reasoning, the procedures provided for in the parties' contract should control and a court should enforce the arbitration agreement with its privately contracted for process, subject only to the claim that the arbitration agreement is void pursuant to state contract law. The FAA provides that arbitration agreements shall be enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract."[75]

However, because claims based on public laws are at stake and because the agreement to arbitrate is generally a contract of adhesion between the employee and the employer, *Gilmer* cannot be read to permit arbitration

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[71] *Id.* at 90. Justice Ginsburg took issue with the Court's decision to place the burden of showing financial inaccessibility on the consumer. She would have remanded the case for clarification of Green Tree's practice. *See id.* at 96 (Ginsburg, J., dissenting).

[72] *See, e.g.*, Michael H. LeRoy & Peter Feuille, *When is Cost an Unlawful Barrier to Alternative Dispute Resolution? The Ever Green Tree of Mandatory Employment Arbitration*, 50 UCLA L. REV. 143 (2002) (analyzing how lower courts handle enforceability of mandatory arbitration agreement when costs associated with arbitration are alleged to be prohibitively high).

[73] That omission is not surprising given the fact that the FAA was enacted almost 40 years prior to the enactment of the first civil rights act.

[74] Volt Info. Scis., Inc. v. Bd. of Trs., 489 U.S. 468, 476 (1989).

[75] 9 U.S.C. § 2 (2000). The Court has held that the enforceability of an arbitration agreement can be challenged based on "generally applicable contract defenses, such as fraud, duress, or unconscionability . . . . " Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 687 (1996).

The Supreme Court's lack of guidance is even more problematic when the reach of the FAA and its preemptory effect is considered. The Court has held that the FAA reaches agreements that "affect" interstate commerce and that it creates federal substantive law that preempts state law or policy that conflicts with the FAA. Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 273–74 (1995); *see, e.g.*, Southland Corp. v. Keating, 465 U.S. 1, 11 (1984). The preemptive reach of the FAA has resulted in the Supreme Court finding that states cannot prohibit arbitration altogether nor can a state condition the enforceability of an arbitration agreement on compliance with special notice requirements. *See, e.g.*, *Casarotto*, 517 U.S. at 688.

under any set of procedural rules.[76] Such a reading would in fact be inconsistent with *Gilmer* insofar as the Court there analyzed the discovery provisions set forth in the NYSE rules to determine if they provided claimants "a fair opportunity to present their claims."[77] It is thus reasonable to read *Gilmer* as requiring certain minimum standards. Unfortunately, the Court did not identify those specific standards. Case law and legislative action could identify those standards. Indeed, case law has already done that to some degree.[78] The *Employment Protocol*, which specifically states that its focus was on "exemplary" standards of due process for mandatory arbitration of statutory employment claims, represents another approach to such standard setting.[79]

The *Gilmer* Court's approval of arbitration as a means to resolve employee disputes caused many employers to require, as a condition of employment, that their employees waive their right to a judicial forum and instead use arbitration if a dispute arose.[80] The increase in the number of disputes by employees against their employers also had a tremendous bearing on employers' decisions to require arbitration as the dispute resolution process of choice for employees' claims, including statutory claims.[81] The increased use of court sanctioned mandatory arbitration clauses by employers made it imperative that the procedural void left by *Gilmer* be filled. Employers were unilaterally crafting arbitration agreements, binding employees to arbitration procedures chosen solely by the employer. Because of a drafting party's natural inclination to draft contract terms favorable to itself,[82] significant concerns were raised about the fairness of those

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[76] *See, e.g.*, Gorman, *supra* note 14, at 644 ("The Supreme Court in the *Gilmer* case did not hold that *any* sort of arbitration procedure before *any* manner of arbitrator would be satisfactory in the adjudication of public rights.").

[77] Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 31 (1991).

[78] *See, e.g.*, Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465, 1482–84 (D.C. Cir. 1997); Armendariz v. Found. Health Psychcare Servs., Inc., 6 P.3d 669 (Cal. 2000).

[79] DUNLOP & ZACK, *supra* note 1, at 173. *But see* Lisa B. Bingham, *Self-Determination in Dispute System Design and Employment Arbitration*, 56 U. MIAMI L. REV. 873, 895 (2002) (characterizing standards contained in *Employment Protocol* as "minimum" standards); Stone, *supra* note 54, at 1045.

[80] *See* Katherine Van Wezel Stone, *Dispute Resolution in the Boundaryless Workplace*, 16 OHIO ST. J. ON DISP. RESOL. 467, 467 (2001) (noting a "dramatic increase in the number of non-union firms adopting arbitration systems" since *Gilmer*).

[81] Gorman, *supra* note 14, at 640–41 (after discussion of the "dramatic increase in employment-related litigation," author concludes: "[l]ittle wonder that many employers have taken the *Gilmer* decision to heart and have moved with increased frequency to draft and incorporate arbitration provisions in employment applications or agreements . . . . ").

[82] *See, e.g.*, DUNLOP & ZACK, *supra* note 1, at 96 ("The employer alone develops the arbitration procedure, and understandably inserts elements that favor its position.").

arbitration systems crafted and required by employers. The need to gain an advantage in a dispute resolution process has been aptly described by Professor Ackerman:

> When disputants employ an adjudicative model of conflict resolution, they forfeit their autonomy with respect to the ultimate decision-making. A device chosen to assert one's ego (as communitarians critical of litigation might describe it) ironically requires loss of control to others: lawyers who put the device in motion, judges and juries who make the ultimate decisions. The frustration stemming from loss of control often leads disputants to try to rig the game, tilt the playing field, and place their thumbs on the scales of justice.[83]

The *Employment Protocol* at least promised to level the playing field for employees.

Gap-filling, although a particularly critical purpose of the protocols, was not the only purpose. The protocols were also developed to encourage the use of arbitration to resolve disputes. In many respects, such encouragement was due to the belief that arbitration was superior to the judicial process. Arbitration promised expert decisionmaking; its informal nature would help to minimize the adversarial tone of the dispute or help mend broken relationships; it would be quick, efficient, and final. In other respects the encouragement of arbitration was due to the fact that the judicial process had "broken down." It had failed to provide justice for those least likely to be able to afford it, and it had failed to ensure that our public values, as reflected in our public laws, were adequately furthered or vindicated.[84] The *Employment Protocol's* secondary purpose, to encourage the use of alternatives to judicial resolution of public law disputes, is made apparent by the direct link between the development of the *Employment Protocol* and the work of the Dunlop Commission, which is detailed in the following section.

2. *The Dunlop Commission's Findings and Recommendations*

In March, 1993, at President Clinton's request, the Secretaries of Commerce (Ronald H. Brown) and Labor (Robert B. Reich) announced the creation of the Dunlop Commission.[85] The Commission, formed to

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[83] Robert M. Ackerman, *Disputing Together: Conflict Resolution and the Search for Community*, 18 OHIO ST. J. ON DISP. RESOL. 27, 62–63 (2002).

[84] *See infra* notes 90–98 and accompanying text.

[85] *See* COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS, FACT-FINDING REPORT xi (May 1994) [hereinafter FACT-FINDING REPORT]. The Mission Statement of the Commission stated: "The future living standards of our nation's people,

"investigate the current state of worker-management relations in the United States,"[86] was asked to respond to three questions, one of which is particularly pertinent: "What (if anything) should be done to increase the extent to which work-place problems are directly resolved by the parties themselves, rather than through recourse to state and federal courts and government regulatory bodies?"[87]

In answer to that question, the Commission, after a period of fact-finding and testimony, recommended the voluntary use of binding arbitration to resolve disputes based on violations of federal statutory employment laws.[88] That recommendation, and the findings upon which it was based, directly led to the creation of the *Employment Protocol.*

a. *Failure of the Judicial and Administrative Systems to Provide Access to Justice for All Employees*

In its Fact-Finding Report, the Commission provided detailed information regarding the then current state of conflict resolution of employment disputes.[89] After describing the increase in the number of laws regulating the workplace and the employment relationship, and noting the exponential growth in employment claims brought in the federal courts and to the related administrative agencies, the Commission found that few employees, particularly low-wage employees, had access to justice. Justice was inaccessible because of the costs, delays, and other barriers associated with bringing claims in either the judicial forum or to an administrative agency.[90] That result was particularly troubling inasmuch as many of the

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as well as the competitiveness of the United States, depend largely on the one national resource uniquely rooted within our borders: our people—their education and skills, and their capabilities to work together productively."

[86] *Id.*

[87] *Id.* The other two questions were:

> 1. What (if any) new methods or institutions should be encouraged, or required, to enhance work-place productivity through labor-management cooperation and employee participation?
>
> 2. What (if any) changes should be made in the present legal framework and practices of collective bargaining to enhance cooperative behavior, improve productivity, and reduce conflict and delay?

Id.

[88] *See* THE DUNLOP COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS, FINAL REPORT 59–60 (1995) [hereinafter FINAL REPORT].

[89] *See* FACT-FINDING REPORT, *supra* note 85, *passim.*

[90] *See id.* at 112-13; *see also*, DUNLOP & ZACK, *supra* note 1, at xiii–xiv ("It was out of the mounting evidence of the lack of access to fairness and statutory protections that

employment laws "focus[ed] on value-laden issues like racial and gender discrimination, occupational hazards, privacy invasions, and the like,"[91] laws that were intended to do more than provide redress but to also "change the mores or customs prevailing in many workplaces."[92]

In addition to its concern for justice for low-wage employees, the Commission also appeared concerned with the possible anticompetitive effect of unequal enforcement of the employment laws.[93] The Commission recognized that if employees were unable to have their claims redressed, those firms that violated the law would have a competitive advantage over those firms that complied with the law.[94]

In its Fact-Finding Report, the Commission cited private dispute resolution processes, including mediation and arbitration, as possible means to provide employees the access to justice they were being denied because of the high costs and delay of traditional litigation.[95] The Commission cited with approval the grievance arbitration process that had been developed under collective bargaining agreements and found that "[p]rivate arbitration has served as an effective and flexible process for resolving issues covered under collective bargaining agreements."[96] Recognizing the potential of private arbitration, the Commission noted that "[t]he difficult practical issue concerns the key safeguards that must be built in to any employment ADR [alternative dispute resolution] model."[97]

The Commission's endorsement of ADR was buttressed by its belief that public sentiment had changed concerning the virtues of ADR. In support of that belief, the Commission noted that Congress supported the use of ADR for the resolution of claims based on civil rights violations. The Commission cited to language in the Civil Rights Reform Act of 1991 that specifically

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the Commission on the Future of Worker-Management Relations proposed the establishment of systems of statutory dispute resolution with due process protection.").

91 FACT-FINDING REPORT, *supra* note 85, at 109.

92 *Id.*; *see also* Stone, *supra* note 54, at 1043:

> [S]tatutory employment rights are enacted when[ever] a legislature believes that workers cannot adequately protect themselves simply by bargaining with their employers. That is, they reflect a legislature's view of market failure in the contracting process. Legislatures act to ensure healthy and safe workplaces, protect privacy on the job, or to provide other protections when they believe that there is a public policy concern so compelling that it warrants intervening in the wage bargain.

93 FINAL REPORT, *supra* note 88, at 72.

94 *Id.*

95 FACT-FINDING REPORT, *supra* note 85, at 113.

96 *Id.* at 122.

97 *Id.* at 118.

encouraged alternative methods to resolving claims based on employment discrimination.[98]

In addition to the language the Commission relied upon, Congress had also affirmatively endorsed alternative dispute resolution in other arenas. For example, the Commission noted that Congress had passed in 1990 the Administrative Dispute Resolution Act,[99] which required federal agencies to "adopt a policy that addresses the use of alternative means of dispute resolution and case management."[100] In the same year, Congress had also passed the Civil Justice Reform Act, which required each federal district court, with the assistance of advisory committees, to evaluate the use of alternative dispute resolution programs.[101] Passage of those two pieces of legislation reflected Congress's concern about the efficacy of the traditional models of dispute resolution used by both its administrative agencies and its court system.

The Commission's concern regarding the accessibility of the judicial and administration systems for low-wage employees reflects the widely shared belief that "preservation of 'individual rights requires an accessible legal system for their protection' and enforcement."[102] It clearly promoted mediation and arbitration as alternative means to achieve access to justice.

b. *Need for Standards Due to Unilateral Imposition of Arbitration by Employers*

After publication of its Fact-Finding Report, the Commission heard testimony regarding non-union employer arbitration systems. Apparently emboldened by *Gilmer*, and undoubtedly in response to the amendments to the Civil Rights Act of 1964, which provided victims of intentional

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[98] *Id.* at 117. In its Final Report, the Commission also relied on similar language in other civil rights statutes and lamented the fact that, despite Congressional encouragement of ADR, administrative and judicial backlogs had risen sharply. FINAL REPORT, *supra* note 88, at 72.

Professor Gorman has argued that Congress's legislative endorsement of ADR in these statutes is diluted by language in committee reports that "suggests that arbitration is not an adequate substitute for litigation and that arbitral errors can be subsequently set aright in a court proceeding." Gorman, *supra* note 14, at 659 n.76.

[99] *See* FINAL REPORT, *supra* note 88, at 72.

[100] Administrative Dispute Resolution Act of 1990, Pub. L. No. 101–552, § 3, 104 Stat. 2736, 2736.

[101] Civil Justice Reform Act of 1990, Pub. L. No. 101–650, 104 Stat. 5089, 5089–137.

[102] Cole v. Burns Int'l Sec. Servs., 105 F.3d at 1482 (citing JEROLD AUERBACH, JUSTICE WITHOUT LAW 144–45 (1983)).

discrimination the right to, among other things, compensatory and punitive damages[103] and a jury trial,[104] the Commission noted that employers imposed such systems as a condition of employment in order to combat "the expansion of litigation and costs."[105] Although some of those systems appeared "serious and fair,"[106] "[m]any of [the] unilaterally established systems . . . [did] not meet the [test] of fairness"[107] and were of "dubious merit for enforcing the public values embedded in our laws."[108]

The systems crafted by individual employers in the non-union context could always be subject to the whim of the employer. In sharp contrast to the arbitration clause contained in a collective bargaining agreement, where the union is present to represent the interests of and negotiate on behalf of the employee, the arbitration clause in the non-union employment arena is typically drafted by the employer and presented to the employee on a take-it-or-leave-it basis. "Thus, employers are free to structure arbitration in ways that may systematically disadvantage employees."[109] Safeguards were clearly needed to provide employees protection from the potential abusive practices of the employer.

In furtherance of its belief that arbitration could play a role in the private resolution of employment disputes if those safeguards were present, Chairman Dunlop asked Arnold M. Zack, then president of the National Academy of Arbitrators,[110] to draft a list of due process standards that should

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[103] 42 U.S.C. § 1981a(b)(3) (2000).

[104] 42 U.S.C. § 1981a(c) (2000).

[105] FINAL REPORT, *supra* note 88, at 73.

[106] *Id.* at 51.

[107] *Id.* at 73.

[108] *Id.* at 51–52 (footnote omitted).

[109] Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465, 1477 (D.C. Cir. 1997) (citing Alfred W. Blumrosen, *Exploring Voluntary Arbitration of Individual Employment Disputes*, 16 U. MICH. J.L. REFORM 249, 254–55 (1983)):

> In non-unionized private sector employment, there is no organization analogous to the union to represent employee interests in developing arbitration procedures. Therefore, the employer and its lawyers have a comparatively free hand in drafting the details of an arbitration clause . . . . Under these circumstances, some employers may seek to unfairly narrow the legal rights of employees in the arbitration clause.

Id.

[110] The National Academy of Arbitrators (NAF) is a "non-profit professional and honorary organization of arbitrators," *See* http://www.naarb.org/ (last visited Feb. 19, 2003). Pursuant to its by-laws, the NAA seeks to "establish and foster the highest standards of integrity, competence, honor and character among those engaged in arbitration of labor-management disputes on a professional basis." *Id.* The NAA, in association with others, has created a Code of Professional Responsibility for Arbitrators

be applied in an "employer-promulgated arbitration system" dealing with discrimination issues. [111] Having found consensus regarding the safeguards from others who testified,[112] the Commission endorsed and encouraged the use of alternative dispute resolution systems,[113] including binding arbitration, for resolution of employment discrimination claims. Such endorsement was conditioned on such systems being voluntary and containing "high quality standards for fairness, due process, and accountability to the goals and remedies established in the relevant law."[114] The Commission believed such alternatives would provide cost effective and fair resolution of claims, and would "serve as effective deterrents to unfair behavior or employer practices,"[115] thereby alleviating the economic[116] and social impact caused by the judicial and administrative systems failure to provide access to justice for all employees.

With respect to binding arbitration of public law disputes, the Commission listed seven standards that should be present in an employer promulgated system: (i) neutral and knowledgeable arbitrator, selected by both the employer and the employee; (ii) simple methods for an employee to secure information related to his or her claim; (iii) a fair method of cost sharing to ensure affordable access, ideally with a cap on the employee's contribution in proportion to his or her pay; (iv) the right to representation at the arbitration if the employee so desires; (v) the opportunity for the employee to obtain the same range of remedies that the employee would be entitled to if the claim were brought in a judicial forum; (vi) an understandable written opinion, by the arbitrator detailing the findings of fact and the reason for the decision; and (vii) judicial review of the award

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of Labor–Management Disputes. *See* http://www.naarb.org/code.html (last visited Feb. 19, 2003).

[111] Arnold M. Zack, *The Evolution of the Employment Protocol*, DISP. RESOL. J., Oct.-Dec. 1995, at 36, 36.

[112] *See* FINAL REPORT, *supra* note 88, at 56.

[113] Among other things, the Commission envisioned the development of in-house alternative dispute resolution systems to deal with employees' claims. *See id.* at 52.

[114] *Id.* at 11.

[115] *Id.* at 21.

[116] In addition to discussing the direct costs associated with litigation of workplace disputes (the Commission found that for every dollar paid to an employee through litigation, at least another was paid to attorneys handing both meritorious and non-meritorious claims), the Commission also noted the costs associated with the design by some employers of "defensive personnel practices." All these costs, the Commission found, reduced the resources that were available for compensation and other benefits to employees. *Id.* at 49.

sufficient to determine whether the arbitrator's decision is consistent with the applicable law.[117]

Significantly, the Commission did not endorse arbitration as a condition of employment. The Commission believed that the wronged individual, rather than the employment contract, should make the choice as to the process to be used.[118] Accordingly, the Commission's endorsement of alternatives was based on such alternatives being used on a voluntary basis.

c. *Creation of the Task Force on Alternative Dispute Resolution and the Development of the Employment Protocol*

Mr. Zack raised his concerns regarding the proper safeguards that should exist in an arbitration system for the resolution of employment disputes in the non-union setting with the Council of the Labor and Employment Law Section of the American Bar Association.[119] Two members of the Council suggested the creation of a committee of representatives from organizations "with a stake in fair due process."[120] Members of the American Arbitration Association (AAA), the American Civil Liberties Union (ACLU), the Society of Professionals in Dispute Resolution (SPIDR),[121] the Federal Mediation and Conciliation Service (FMCS), the National Employment Lawyers Association (NELA), the National Academy of Arbitrators (NAA), and the American Bar Association (ABA) formed a Task Force on Alternative Dispute Resolution, which began its work in September 1994.[122] Finding that it "shared similar views of due process, felt such standards could be codified, and believed [it] should proclaim such unanimity to those charged with the responsibility of developing dispute settlement procedures in the employment field,"[123] the Task Force drafted the *Employment Due Process Protocol*. The *Protocol* was unveiled in May 1995,[124] a few months after the Dunlop Commission issued its Final Report. The members of the

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[117] *See id.* at 56–58.

[118] *See id.* at 59.

[119] DUNLOP & ZACK, *supra* note 1, at xviii.

[120] Zack, *supra* note 111, at 36.

[121] SPIDR merged with the Academy of Family Mediators (AFM) and Conflict Resolution Education Network (CRENet) to form the Association for Conflict Resolution. *See* http://www.acresolution.org/research.nsf/articles/6B902FC81A6451BB85256ACE00509A65 (last visited Sept. 9, 2003).

[122] DUNLOP & ZACK, *supra* note 1, at xiv.

[123] *Id.* at xix.

[124] *Id.* at 45.

Task Force were careful to note that their assent to the *Protocol* reflected their own personal views "and should not be construed as representing the policy of the designating organizations."[125]

Although unanimous on the procedures that should be followed once arbitration was initiated, the Task Force was unable to agree on the very basic, but critical, issue: the use of pre-dispute arbitration clauses. In other words, the Task Force failed to reach consensus on what might be described as the heart of the issue: whether an employee could be required to agree, as a condition of employment, to arbitrate his or her claims with the employer prior to knowing the exact nature and substance of those claims. As stated by the Task Force: "The Task Force takes no position on the timing of agreements to mediate and/or arbitrate statutory employment disputes, though it agrees that such agreements be knowingly made."[126] The Task Force's failure to reach consensus on this essential point will be discussed below.[127]

B. *The Source of the Procedures in the Employment Protocol*

It is abundantly clear that, at a minimum, practical necessity led to the creation of the protocols. Given the Supreme Court's authorization of arbitration for public employment law disputes and the legal systems' failure to provide employees (and others) with meaningful access to justice, it was clear that arbitration would play a much greater role in the resolution of disputes between employers and employees. Moreover, given the employers' desire to impose arbitration as a condition of employment, with terms that were advantageous to the employer, the need to level the playing field was apparent. The drafters of the *Employment Protocol* were well aware of the existence of employer dispute resolution plans that "constituted inequitable and oppressive efforts to tilt the result of such [arbitration] to the employer, while depriving employees of many rights usually associated with due process and fairness."[128]

Fair process is important not only to level the playing field between the parties but also to achieve the values associated with the public laws subject to arbitration. It is beyond dispute that the process by which substantive rights are enforced can have an impact on those very rights.[129] If employees

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[125] *Id.* at 171.

[126] *Id.* at 173.

[127] *See infra* notes 447–450 and accompanying text.

[128] DUNLOP & ZACK, *supra* note 1, at xiii.

[129] *See, e.g.*, Leslie M. Kelleher, *Taking "Substantive Rights" (In the Rules Enabling Act) More Seriously*, 74 NOTRE DAME L. REV. 47, 59 (1998) (discussing the

were to benefit from the rights and remedies granted to them by the anti-discrimination employment laws, the process by which those rights and remedies were to be enforced needed to be tailored so that the policy goals embodied in the substantive right were achieved.

With arbitration no longer the product of arms-length negotiation, where both parties could bargain for a fair process that protects and preserves the rights granted to each party from the laws subject to arbitration, [130] it was clear that standards were needed to govern the arbitral process when the arbitration agreement was presented to the employee on a take-it-or-leave-it basis. However, what those standards should be was not patently obvious. Accordingly, the source of the procedures characterized as "due process" by the drafters of the protocols will now be examined.

1. *The Constitutional Dimension of Procedural Due Process*

The characterization of the procedures as "due process" immediately calls to mind the Fifth and Fourteenth Amendments to the United States Constitution, which prohibit the United States and state governments from depriving a person of "life, liberty or property without due process of law."[131] Although the "concept of procedural due process has never been controversial," disputes have arisen regarding "what procedures should be required" when a state or the federal government seeks to deprive a person of life, liberty or property.[132] The Supreme Court has been unwilling to set forth a uniform set of procedures that must be followed in all circumstances,[133] because "due process . . . is not a technical conception with a fixed content unrelated to time, place and circumstance . . . [but rather] is flexible and calls

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impact of the Federal Rules of Civil Procedure on substantive outcomes); *see also* Thomas E. Carbonneau, *Arbitration and the U.S. Supreme Court: A Plea for Statutory Reform*, 5 OHIO ST. J. ON DISP. RESOL. 231, 265–66 (1990) (discussing the impact of the arbitration process on substantive rights); Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 680 (1996) (noting that "[e]very litigator knows that procedural rules affect substantive outcomes").

[130] *See* Thomas J. Stipanowich, *Resolving Consumer Disputes*, DISP. RESOL. J., Aug. 1998, at 8, 10 ("In the traditional model of commercial arbitration, premised upon arms-length negotiations between parties, the identity and qualifications of the arbitrators, procedural due process, and arbitral discretion are all matters for bargaining. In other words, it is generally up to the parties to define what is 'fair.'").

[131] U.S. CONST. amends. V and XIV, § 1.

[132] ERWIN CHEMERINSKY, CONSTITUTIONAL LAW, PRINCIPLES AND POLICIES § 7.1, at 421 (1997).

[133] *Id.* at § 7.4.2, at 451.

for such procedural protections as the particular situation demands."[134] Although standard procedures have not been provided by the Court, the "core elements of due process" entail "certain basic safeguards, such as notice of the charges or issues, the opportunity for a meaningful hearing, and an impartial decisionmaker."[135]

The literature regarding the creation of the *Employment Protocol* does not tie the development of the specific standards to any constitutional mandate or requirement, although at least one of the drafters recognized its constitutional origins.[136] It is not surprising that a direct link is missing inasmuch as "courts have consistently held that private arbitration lacks any element of state action,"[137] which is, with some exceptions, required for

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[134] *Id.* (quoting Mathews v. Eldridge, 424 U.S. 319, 334 (1976) (citations omitted)).

[135] CHEMERINSKY, *supra* note 132, at § 7.4.2, at 450.

To determine the procedures that should be followed when a person is deprived of life, liberty or property, a court is to balance three factors:

> the private interest that will be affected by the official action . . . the risk of an erroneous deprivation of such interest through the procedures used and the probable value, if any, of additional procedural safeguards . . . and the government's interest, including the fiscal and administrative burdens that the additional procedures would entail.

Mathews, 424 U.S. at 335.

Due process has been found to require, at least in the case of termination of public assistance benefits, an evidentiary hearing prior to termination with the right to confront adverse witnesses, to present arguments and evidence orally, to have counsel present and to have a decision by an impartial decisionmaker that is based solely on the evidence presented at the hearing. *See* Goldberg v. Kelley, 397 U.S. 254, 266-68, 270–71 (1970); *see also* Lisa B. Bingham & Shimon Sarraf, *Employment Arbitration Before and After the Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of Employment: Preliminary Evidence that Self-Regulation Makes a Difference*, at 4 (2000) (unpublished manuscript, on file with author).

> Courts have defined [due process] to include notice, reasonable discovery of relevant evidence, an opportunity to be heard, to confront and cross examine witnesses, the right to counsel or a representative, an impartial hearing officer, a record of the proceedings, and a reasoned decision explaining what evidence persuaded the decisionmaker.

Bingham & Sarraf, *supra*, at 4.

[136] *See* DUNLOP & ZACK, *supra* note 1, at 117 ("Formulation of due process standards is not done lightly or quickly. It has taken our legal institutions since the Magna Carta to develop the standards of due process and legal fairness to which we believe all citizens should be entitled.").

[137] Cremin v. Merrill Lynch Pierce Fenner & Smith, Inc., 957 F. Supp. 1460, 1468 (N.D. Ill. 1997) (citing Davis v. Prudential Sec., Inc., 59 F.3d 1186, 1191 (11th Cir. 1995)).

application of constitutional prohibitions to particular conduct.[138] Accordingly, under the state action doctrine, private arbitration would not have to comport with the requirements of procedural due process found in the Fifth and Fourteenth Amendments.[139]

While it is arguable that the Constitution may not have required the imposition of due process protections, it is entirely possible that the drafters of the *Protocol* believed that the substantive public laws, subject to arbitration since *Mitsubishi*, required that disputes brought pursuant to their provisions in an arbitral forum be given due process protections.[140] Such a finding is consistent with the Supreme Court's belief that the deterrent and remedial purposes of public laws will be served "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum,"[141] and its finding that process can indeed impact upon substantive rights.[142] Other commentators have determined that the FAA itself requires that the process of arbitration be a fair one, requiring the implementation of due process minimums.[143]

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[138] *See* CHEMERINSKY, *supra* note 132, § 6.4.1.

[139] Legal scholars have argued that state action is in fact implicated by private arbitration. *See, e.g.*, Richard C. Reuben, *Public Justice: Toward a State Action Theory of Alternative Dispute Resolution*, 85 CAL. L. REV. 577, 590 (1997) (arguing that "the history and operation of the statutory schemes delegating the government's traditionally exclusive role in legally binding dispute resolution to seemingly private parties, and the intense entanglement of public courts in that delegation, often establish state action that must trigger constitutional protections . . . . "); Jean R. Sternlight, *Rethinking the Constitutionality of the Supreme Court's Preference for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers, and Due Process Concerns*, 72 TUL. L. REV. 1, 40–47 (1997) (arguing that the Supreme Court's preference for binding arbitration constitutes state action).

[140] *See, e.g.*, Martin H. Malin, *Arbitrating Statutory Employment Claims in the Aftermath of* Gilmer, 40 ST. LOUIS U. L.J. 77, 96 (1996):

> [K]ey to the [*Gilmer*] Court's analysis—that compelled arbitration was consistent with the ADEA's policies—was its view that enforcement of the arbitration agreement did not vitiate Gilmer's ADEA claim but merely changed the forum in which he was to seek vindication. That rationale dissipates if the arbitral forum does not meet minimum standards of procedural justice.

See also Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465, 1482 (D.C.Cir. 1997).

[141] Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 637 (1985). *See, e.g.*, Suzan A. FitzGibbon, *Reflections on* Gilmer *and* Cole, 1 EMP. RTS. & EMP. POL'Y. J. 221, 234 (1997) ("Effective vindication of a statutory right in arbitration assumes a fair arbitral process . . . . ") (citation omitted).

[142] *See, e.g.*, Brown v. W. Ry. of Ala., 338 U.S. 294 (1949).

[143] *See, e.g.*, Maltby, *supra* note 14, at 16.

Whatever the "legal" source, it is abundantly clear that the imposition of due process standards was considered essential by Mr. Zack, the initiator of the *Employment Protocol*, if arbitration was to be a substitute, or a "reasonable equivalent," for the judicial and administrative models that had failed employees.[144] Those models, although inaccessible to employees, had created an expectation and a standard of fairness by which employees and others would judge the fairness of the alternative system.[145] The credibility of the system would also be impacted by society's view of the fairness of its processes. Fairness of process implicated due process protections.

2. *Labor Arbitration Model*

Although not directly tied to a constitutional mandate, it is clear that the protocols embody many of the "core principles" of due process. These protections were familiar to some of the drafters of the *Employment Protocol* because they are present in labor arbitration, and the drafters of the *Employment Protocol*, particularly Mr. Zack, had extensive experience in labor arbitration. Through the process of negotiation between labor unions and management, typical labor arbitration, it is asserted, contains "most . . . [due process] safeguards . . . . "[146] Accordingly, the due process aspects of union-management arbitration served as a model for the creation of the *Employment Protocol*.[147] That model was used because grievance arbitration "[met] many of the requirements of effective dispute resolution system design," and "achieved such a high degree of confidence" that it enjoys "strong judicial endorsement."[148]

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[144] DUNLOP & ZACK, *supra* note 1, at 93, 95.

[145] *Id.* at 93.

[146] Bingham & Sarraf, *supra* note 135, at 5; *see also* FitzGibbon, *supra*, note 141, at 224 ("[L]abor arbitration involves time-tested procedures and due process safeguards."); Maltby, *supra* note 14, at 11 (discussing the "established safeguards" in labor arbitration to "protect against procedural improprieties and . . . ensure a just result"); Julius G. Getman, *Labor Arbitration and Dispute Resolution*, 88 YALE L.J. 916, 916 (1979) (arguing that when labor arbitration functions properly, it achieves, among other things, the goal of fairness).

[147] DUNLOP & ZACK, *supra* note 1, at 36 (authors assert that the "standards of fairness and due process" present in labor arbitration "should be worthy of general adoption if arbitration in the employment law arena is to treat employees and employers fairly and to bring greater equity to the resolution of workplace disputes").

[148] FACT-FINDING REPORT, *supra* note 85, at 115; *see also* FitzGibbon, *supra* note 141, at 222 ("In 1960 the U.S. Supreme Court significantly endorsed labor arbitration as practically an essential part of collective bargaining . . . . ").

Recognizing that non-union employees have no bargaining power to negotiate the terms of the arbitration clause with employers, the drafters of the *Employment Protocol* believed that "adoption of the due process standards from the collective bargaining environment would alleviate to some degree the imbalance between [the] employer and individual employee."[149] Although such standards are not a "panacea for resolving all disputes outside the collective bargaining context," they "do set forth standards for fair treatment" that are "the result of decades of collective bargaining and arbitration decisions."[150] Although those standards provided the blueprint for the *Employment Protocol*, some modifications were made based on the unique nature of arbitration of statutory claims in the non-union environment.[151]

Adoption of labor arbitration's "time-tested" procedural safeguards addressed the drafters' additional concern that without adherence to those procedures, non-union arbitration would be discredited, which, in turn, would tarnish the otherwise good image of labor arbitration. As stated by Mr. Zack:

> *Gilmer* raised the prospect of employers structuring unfair forums invoking the name of arbitration without the due process protections, which had been so carefully nurtured in 50 years of collective bargaining arbitration. As then-President of the National Academy of Arbitrators, I was particularly concerned about the impact this might have on the reputation of labor management arbitrators.[152]

Accordingly, imposition of due process standards was necessary, not only to protect employees required to arbitrate their claims of discrimination against their employers, but also to protect and preserve the reputation of arbitration, generally, and labor arbitration, specifically.

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[149] DUNLOP & ZACK, *supra* note 1, at 26.

[150] *Id.* at 36.

[151] Prior to the adoption of the *Employment Protocol*, some commentators believed that the differences between grievance arbitration and public law arbitration were significant enough that the "format and procedures" of grievance arbitration should not be "mechanically transferred to public law arbitration." Gorman, *supra* note 14, at 639; *see also* Getman, *supra* note 146, at 917, 934–35 (discussing the application of labor arbitration to non-unionized employment and finding formidable obstacles to such application, due in part, to the "idiosyncratic nature of labor arbitration and its crucial interrelationship with unionization and collective bargaining").

[152] Zack, *supra* note 8, at 36.

3. *"The Luster of the Legal Process Radiates the Promise of Justice"*[153]

The Task Force was wise to focus on the fairness of the process to help arbitration of public law disputes in the non-union context gain legitimacy and credibility, which would further its goal of providing average employees access to justice. Studies have shown that a claimant's satisfaction with a dispute resolution system is primarily influenced by his or her perception of the procedural fairness of the system.[154] While fairness of outcome and "winning" were important to litigants, such concerns were not as important as the "process by which their case [was] . . . handled."[155] Satisfaction with the process had an impact on the litigant's intention to comply with a ruling, and with his or her general willingness to follow the law in his or her everyday life.[156] Judgments about the fairness of the process influenced a litigant's evaluation of the "third parties with whom they deal . . . the court system and the law."[157]

Infusing arbitration with due process protections undeniably will influence the public's perception of the process. Indeed, the drafters hoped that by "specifying clear and stringent quality standards for arbitration," the *Employment Protocol* would help "overcome[] the high level of skepticism and criticism" associated with some arbitration arrangements.[158] Instead of viewing arbitration as a one-sided process that inures solely to the benefit of

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[153] JEROLD S. AUERBACH, JUSTICE WITHOUT LAW?, at vii (1983).

[154] Tom R. Tyler, *Citizen Discontent with Legal Procedures: A Social Science Perspective on Civil Procedure Reform*, 45 AM. J. COMP. L. 871, 883–85 (1997). *Cf.* Ackerman, *supra* note 83, at 37 ("Even when private processes, such as mediation and arbitration, are employed, parties are likely to emerge most satisfied when they have been given 'voice' (i.e. when they have been sufficiently heard), and when they have been treated as fully enfranchised members of the community."). According to Professor Haydock, what consumers, employees, and others want in a dispute resolution system:

> reflect[s] the basic elements of a fair hearing: (1) speed—reasonably prompt, (2) cost—affordable and proportional, (3) an accessible proceeding comporting with "due process" standards, (4) a wise, impartial decision maker—who knows the applicable law, and (5) a predictable decision based on the facts and law—and not a compromise or "split the baby" decision.

Roger S. Haydock, *Civil Justice and Dispute Resolution in the Twenty-First Century: Mediation and Arbitration Now and for the Future*, 27 WM. MITCHELL L. REV. 745, 747 (2000).

[155] Tyler, *supra* note 154, at 882 (citations omitted).

[156] *Id.* at 883–85.

[157] *Id.* at 884.

[158] Thomas A. Kochan, *Using the Dunlop Report to Achieve Mutual Gains*, 34 INDUS. REL. 350, 358 (1995).

the party who insisted on the clause, the process may be viewed for the benefits it provides to the claimant, the most important of which may be that it is an accessible process in which to seek redress for an employer's violation of the anti-discrimination laws.[159] Most importantly, as will be shown below, all the protocols provide claimants with what they want most in a dispute resolution process: the opportunity to "tell their side of the story."[160]

The Task Force's appreciation of the importance of and need for fair process in the arbitral hearing reflects society's belief, or blinders, as some might assert, that process promises justice.[161] Indeed, one of the justifications for procedural due process is its perceived ability to "enhanc[e] accuracy."[162] Legal process, however, has a "dark[] side . . . [i]t can be threatening, inaccessible and exorbitant," particularly "for the least powerful people in society."[163] Moreover, some commentators have recognized that not all procedures that currently make up our legal process are essential to ensure fairness or accuracy: "Surely there is a good deal of tosh—that is, superfluous rituals, rules of procedure without clear purpose, needless precautions preserved through habit—in the adjudicative process as we observe it in this country."[164]

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[159] *See supra* notes 89–94 and accompanying text (detailing how concerns over the inaccessibility of the judicial system led, in part, to the creation of the *Employment Protocol*).

[160] Tyler, *supra* note 154, at 883.

[161] AUERBACH, *supra* note 153, at 3. It should be noted that "arbitration shares many of the characteristics of traditional courtroom litigation." Ackerman, *supra* note 83, at 67; *see also* Getman, *supra* note 146, at 931–32 ("Arbitration has no unique procedural aspects and the . . . process[] [of arbitration and adjudication] are frequently indistinguishable."). Accordingly, that closeness may create expectations on the part of disputants that the arbitral process will contain many of the same procedures that would be available in the judicial forum.

[162] *Cf.* Jerry L. Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in* Mathews v. Eldridge: *Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28, 48 (1976) (criticizing the Supreme Court for too narrowly perceiving the value of procedure as a means to enhance accuracy in decisionmaking).

[163] AUERBACH, *supra* note 153, at vii.

[164] Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 356 (1978); *see also* Jon O. Newman, *Rethinking Fairness: Perspectives on the Litigation Process*, 94 YALE L.J. 1643, 1648 (1985) (arguing that some procedural rules may not be worthwhile given the slight chance that they will promote fairness).

In determining which procedures were necessary to ensure fairness[165] and accuracy, two of the values sought to be furthered by procedural due process, the drafters were sensitive to the notion that those procedures not convert the arbitral process into the judicial process. Arbitration was viewed as a mechanism for alleviating the "dark side" of litigation in a judicial forum, particularly as it impacted low-wage employees. If arbitration was to gain standing, it had to transcend those problems. Thus, the drafters of the protocols walked a fine line in separating the "tosh" from the "essential" to ensure a fundamentally fair process to all parties in the arbitration and to gain the public's trust and faith in arbitration as a "substitute for the courts."[166]

C. *The Employment Protocol*

The procedures detailed in the *Employment Protocol* closely follow those procedures the Commission outlined in its Final Report. It provides that employees should have the right to be represented by "a spokesperson of their own choosing" at the arbitration,[167] and should have the right to limited discovery, including "all information reasonably relevant" to the employee's claim.[168]

With respect to arbitrator selection and qualifications, the *Employment Protocol* provides that the parties should be able to contact the representatives of the disputants in the last six cases handled by the proposed arbitrator.[169] In addition, the arbitrators should be qualified to handle employment discrimination cases: "arbitrators selected for such cases should

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[165] "In the realm of adjudicatory procedure, a widely recognized aspect of procedural fairness is equality of opportunity to be heard." Mashaw, *supra* note 162, at 52.

[166] DUNLOP & ZACK, *supra* note 1, at 72.

[167] *Employment Protocol*, *supra* note 1, at 173. The *Employment Protocol* goes on to recommend a system where the employer reimburse the employee for "at least a portion of the employee's attorney fees, especially for lower paid employees." *Id.* It also provides that the arbitrator have the authority to award attorney fees as part of the employee's remedy "in accordance with applicable law or in the interests of justice." *Id.*

[168] Discovery can include pre-hearing depositions. *Id.*

[169] *Id.* at 174; *see infra* note 445 and accompanying text (concerning the adequacy of this provision).

With respect to the mechanics of selecting an arbitrator, the *Employment Protocol* recommends that the arbitration service provider (called the designating agency) "utilize a list procedure," if the parties request or "select a panel composed of an odd number of . . . arbitrators from its roster or pool." *Id.* at 175, 176. Parties should also be given information about the arbitrators prior to making their selection. In the event that the parties do not want to utilize the striking procedure or if it is unsuccessful, the "selection process could empower the designating agency to appoint a[n] . . . arbitrator." *Id.*

have skill in the conduct of hearings, knowledge of the statutory issues at stake in the dispute, and familiarity with the workplace and employment environment."[170] The roster of arbitrators "should be established on a non-discriminatory basis, diverse by gender, ethnicity, background, and experience."[171] The drafters of the *Employment Protocol* further recommended the selection of "impartial arbitrators," who are "independent of bias toward either party."[172] In that connection, the *Employment Protocol* requires that arbitrators disclose any real or perceived conflicts of interest and that they be required to "sign an oath . . . affirming the absence of such present or existing ties" to the parties.[173]

The arbitrators are also required to follow "applicable agreements, statutes, regulations and rules of procedure of the designating agency."[174] That authority includes the ability to "determine the time and place of the hearing, permit reasonable discovery, issue subpoenas, decide arbitrability issues, preserve order and privacy in the hearings, rule on evidentiary matters, determine the close of the hearing and procedures for post-hearing submissions, and issue an award resolving the submitted dispute."[175] In making the award, the "arbitrator should be empowered to award whatever relief would be available in court under the law,"[176] and the arbitrator "should issue an opinion and award setting forth a summary of the issues . . . ,"[177] which should be "final and binding" and subject to limited review.[178]

Finally, with respect to costs, the *Employment Protocol* states that "[i]mpartiality is best assured by the parties sharing the fees and expenses of

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[170] *Id.* at 174.

[171] *Id.* The drafters recognized that "[t]he existing cadre of labor and employment . . . arbitrators" may not possess all of the qualifications needed to hear discrimination cases, particularly with respect to "knowledge of the statutory environment" and the "characteristics of the non-union workplace." *Id.* In that connection, the drafters recommended the development of training programs. *Id.* at 175.

[172] *Id.* at 174–75.

[173] *Employment Protocol*, *supra* note 1, at 176.

[174] *Id.*

[175] *Id.*

[176] *Id.* This is a significant provision inasmuch as arbitration clauses have been used to restrict the arbitrators' power to award specific kinds of relief otherwise available under statutory law. *See, e.g.*, Circuit City Stores, Inc. v. Adams, 279 F.3d 889, 893 (9th Cir. 2002), *cert. denied*, 539 U.S. 1112 (2002); Hooters of Am., Inc. v. Phillips, 39 F. Supp.2d 582 (D.S.C. 1998), *aff'd.* 173 F.3d 933 (4th Cir. 1999); Graham Oil Co. v. ARCO Prod.Co., 43 F.3d 1244 (9th Cir. 1995).

[177] *Employment Protocol*, *supra* note 1, at 176.

[178] *Id.* at 177.

the . . . arbitrator."[179] However, it recognizes that "the economic condition of a party" may require a different approach to cost sharing. If that is the case, the *Employment Protocol* instructs the parties to "make mutually acceptable arrangements to achieve" the goal of equal sharing.[180] If unable, the arbitrator is given the authority to determine allocation of fees.[181]

Each of the provisions of the *Employment Protocol* were designed to help create a level procedural playing field between the disputants and to give disputants an equal opportunity to be heard. In addition, the *Employment Protocol* sought to restrain certain attempts by the drafter of the clause to gain an advantage in the process, by either unilaterally selecting the arbitrator, restricting the remedies available to a claimant, imposing the full cost of the process on the claimant, restraining the claimant's ability to prove his or her case by restricting access to information, or by depriving the claimant of the right to be represented at the arbitration. Indeed, the *Employment Protocol* instructs arbitrators to reject cases if "the procedure lacks requisite due process."[182] It also imposes upon arbitrators and arbitration service providers the obligation to obtain proper training to handle statutory employment disputes.

D. *The Impact of the Employment Protocol on Arbitration Law and Practice*

The *Employment Protocol* has had a far-reaching impact. Not only has it provided employees with a more balanced process when required to arbitrate a controversy with an employer, it has also acted as the blueprint for the development of due process protocols for consumers and those involved in health care disputes. In addition, the *Employment Protocol* has been used to provide guidance to federal and state agencies creating arbitration programs and to the courts when attempting to determine the enforceability of a particular arbitration clause. Federal lawmakers have also looked to it for guidance in various attempts to amend the FAA.

1. *Adoption of the Protocol by Arbitration Service Providers and Others*

After the *Employment Protocol* was completed, the drafters made an effort to inform those involved in employment arbitration about the due

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[179] *Id.*

[180] *Id.*

[181] *Id.*

[182] *Id.* at 175.

process standards.[183] The *Employment Protocol* was endorsed by, among others, the NAA, the ABA Labor and Employment Law Section, and the National Employment Lawyers Association (NELA).[184]

One of the most, if not the most, significant effects of the creation of the *Employment Protocol* to individual employees was the adoption of its principles and standards by major arbitration service providers. The role of the providers cannot be underestimated: "The vast majority of arbitrations conducted both domestically and internationally are 'sponsored' in some way by 'provider' organizations."[185] These organizations are generally designated in the arbitration agreement as the entity that will provide arbitration services in connection with the dispute. Those services can range from administering the arbitration and supplying lists of arbitrators to, "in the most active forms of management, review [of] arbitral awards and full[] supervi[sion] [of] the process."[186] Indeed, one commentator has opined: "The future of privatized justice depends upon the integrity of administering institutions and the quality of their response to key procedural and remedial issues."[187] As will

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[183] DUNLOP & ZACK, *supra* note 1, at xix.

[184] *Dispute Resolution: ABA Committee Debates Guidelines for Arbitrating Statutory Rights Disputes*, 153 DAILY LAB. REP. (BNA) C3 (Aug. 9, 1995). Interestingly, SPIDR, who had a representative on the Dispute Resolution Task Force, did not endorse the *Employment Protocol*. *Id.*

Although the NAA endorsed the *Employment Protocol*, it did not approve of the use of mandatory arbitration as a condition of employment. In May 1997, at its fiftieth annual meeting, the NAA issued a statement opposing "mandatory employment arbitration as a condition of employment when it requires waiver of direct access to either a judicial or administrative forum for the pursuit of statutory rights." *See* http://www.naarb.org/guidelines.html#Statement (last visited Sept. 26, 2003). However, the NAA declined to prohibit its members from serving as arbitrators in such cases. In that regard, "members should consider and evaluate the fairness of any employment arbitration procedures in light of the Academy's 'Guidelines on Arbitration of Statutory Claims Under Employer-Promulgated Systems.'" *Id.* Those guidelines "provide an outline of practical, procedural, and evidentiary questions of application that the arbitrator might encounter in deciding whether to hear these cases and, if so, how they might be resolved." *Id.* Significantly, the guidelines tell arbitrators that withdrawal from an arbitration that does not comply with fundamental due process "carries considerable moral suasion." *Id.*; *see also* FitzGibbon, *supra* note 141, at 222 (explaining why statement of NAA was "understandable").

[185] Carrie Menkel-Meadow, *Ethics Issues in Arbitration and Related Dispute Resolution Processes: What's Happening and What's Not*, 56 U. MIAMI L. REV. 949, 965 (2002). *But see infra* note 308 and accompanying text (regarding arbitration of consumer claims).

[186] Menkel-Meadow, *supra* note 185, at 965.

[187] Stipanowich, *supra* note 130, at 13.

be discussed below,[188] in recognition of the important role these provider organizations play in the administration of private justice, the CPR-Georgetown Commission of Ethics and Standards of Practice in ADR promulgated guidelines for providers of ADR services which were "designed to suggest 'best practices' and 'baseline measures' . . . in the provision of arbitration and (other ADR) services." [189]

Thus, perhaps in recognition of the "salient role" they play in the provision of private justice,[190] the AAA[191] and the Judicial Arbitration and Mediation Services, Inc., (JAMS)[192] both endorsed the *Employment Protocol* and revised their arbitration rules to reflect its principles.[193] In that connection, both organizations indicated that they would decline to administer arbitration if the arbitration agreement did not comply with those

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[188] *See infra* note 305 and accompanying text.

[189] Menkel-Meadow, *supra* note 185, at 965–667.

[190] Stipanowich, *supra* note 130, at 13.

[191] The AAA, a non-profit organization, is the "nation's largest full-service ADR provider." *A Brief Overview of the American Arbitration Association, at* http:www.adr.org/index2.1.jsp?JSPssid=15765 (last visited Oct. 13, 2003). In 2002, it administered 230,255 cases. *Id.* It has resolved workplace disputes for "nearly 700 corporations and 6 million employees." *Id.*

[192] JAMS is a for-profit provider that was founded in 1979. In July 1999, "a group of 45 neutrals and managers purchased the company from institutional investors . . . . " *See* http://www.jamsadr.com/who_we_are.asp (last visited Oct. 13, 2003).

[193] DUNLOP & ZACK, *supra* note 1, at xiv, 89; *see also JAMS/Endispute Issues Minimum Standards for Employment Arbitration*, 6 WORLD ARB. & MEDIATION REP. 50, 50 (1995); *Arbitration: Revised AAA Arbitration Procedures Reflect Due Process Task Force Scheme*, 102 DAILY LAB. REP. (BNA) A1 (May 28, 1996); Green, *supra* note 16, at 426.

The significance of this event should not be overlooked. Endorsement of the *Employment Protocol* meant that these providers would no longer administer employment arbitrations according to the terms and conditions set forth in the arbitration agreement only, but rather according to the mandates of the protocol. If a conflict arose between the terms of the agreement and the protocol, the providers were bound to follow the protocol.

Adoption of the *Employment Protocol* provided the AAA and JAMS a basis upon which to justify their continued practice of accepting mandatory arbitration claims in the wake of a threatened boycott of their services by members of NELA because of such practice. *See Arbitration: ADR Services Will Maintain Practice of Hearing Compulsory Arbitration Cases*, 214 DAILY LAB. REP. (BNA) A4 (Nov. 6, 1995); *see also* Richard C. Reuben, *Mandatory Arbitration Clauses Under Fire*, A.B.A. J., Aug. 1996, at 58, 58–59 ("[due process protocols] largely languished until NELA issued an ultimatum to AAA and JAMS . . . .); Green, *supra* note 16, at 426 (discussing boycott); Green, *supra* note 55, at 221 (same); FitzGibbon, *supra* note 141, at 226–227 (same).

rules.[194] By endorsing and adopting the *Employment Protocol*, these arbitration service providers ceased their practice of administering *any* employer-promulgated arbitration agreement presented to them.[195] By agreeing to administer only employment arbitrations that were in compliance with the *Employment Protocol*, employees, whose employers sought to use the services of the AAA or JAMS, were, for the first time, protected, to some degree, from certain aspects of one-sided arbitration clauses. Other arbitration service-providers undertook similar steps.[196]

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[194] Although the AAA endorsed the *Employment Protocol* in 1995, concerns were raised by Mr. Zack in February 1996 that the AAA continued to administer programs that were not in compliance with it. *See Arbitration: Labor Lawyers at ABA Session Debate Role of American Arbitration Association*, 31 DAILY LAB. REP. (BNA) A11 (Feb. 15, 1996).

[195] DUNLOP & ZACK, *supra* note 1, at 166.

[196] In its Arbitration Bill of Rights, the National Arbitration Forum ("NAF"), "one of the world's largest neutral administrators of arbitration services" sets forth twelve principles for the conduct of an arbitration, including the right to a "fundamentally fair process." *See* http://www.arbitration-forum.com/arbitration/questions.asp#1 (last visited Sept. 26, 2003). The NAF "will not administer arbitration under contracts that do not meet these principles." National Arbitration Forum, *Arbitration Bill of Rights*, *at* http://www.arbitration-forum.com/articles/pdfs/bor_12-31-02.pdf (last visited Oct. 13, 2003); *see also* Carroll E. Neesemann, *Should An Arbitration Provision Trump the Class Action? Yes: Permitting Courts to Strike Bar on Class Actions in Otherwise Clean Clause Would Discourage Use of Arbitration*, DISP. RESOL. MAG., Spring 2002, at 13, 16 (discussing due process standards of NAF, JAMS, and AAA).

The CPR Institute for Dispute Resolution, a nonprofit "initiative of 500 general counsel of major corporations, leading law firms, and prominent legal academics in support of private alternatives to the high costs of litigation," has adopted the Employment Dispute Arbitration Procedures which the CPR maintains are consistent with the *Employment Protocol*. *See* http://www.cpradr.org. (last visited Sept. 26, 2003); *see also* Green, *supra* note 55, at 211 n. 257.

The NASD, like the NYSE ceased its practice of requiring employees to arbitrate statutory employment claims against their employers as a condition of registering with it, although it did not bar employers from mandating arbitration of such claims. *See supra* notes 20–21 and accompanying text; Self-Regulatory Organizations; National Association of Securities Dealers, Inc.; Order Granting Approval to Proposed Rule Change Relating to the Arbitration of Employment Discrimination Claims, Exchange Act Release No. 34-40109, 67 S.E.C. Docket 824 (June 22, 1998); *see also Arbitration: Proposed Change in NASD's Policy on Arbitration Gets Mixed Reactions*, 167 DAILY LAB. REP. (BNA) C1 (Aug. 28, 1997); *NASD to Eliminate Mandatory Arbitration of Statutory Discrimination Claims*, 11 NASD REGULATORY & COMPLIANCE ALERT 1, 4 (Sept 1997).

Since the NASD eliminated that requirement, it has also made changes to its own rules governing the arbitration of employment statutory disputes that reflect the principles embodied in the *Employment Protocol*. Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change and Amendment No. 1 by the National Association of

The *Employment Protocol* also got the attention of certain state and federal agencies.[197] For example, in 1996, the Massachusetts Commission Against Discrimination developed an arbitration program using the AAA, which agreed to use rules and procedures consistent with the *Employment Protocol.*[198] The United States Labor Department gave notice that it intended to implement pilot projects using, among other things, arbitration in certain categories of cases and promised that such arbitration would contain fair procedures. The *Employment Protocol* was cited as a document that was reviewed in connection with creation of the pilot project.[199]

2. *Development of the Consumer and Health Care Protocols*

The *Employment Protocol* served as a model for the *Consumer Protocol*[200] and the *Health Care Protocol.*[201] As will be seen below, those protocols expand and further refine many of the principles set forth in the *Employment Protocol.*

Creation of the *Consumer Protocol* came at the instigation of the AAA.[202] In 1997, a National Consumer Disputes Advisory Committee was convened by the AAA with representatives from consumer groups, providers of goods and services, state and federal agencies and academic institutions.[203] This committee's role was to "advise the [AAA] in the development of standards and procedures for the equitable resolution of consumer disputes."[204] In addition to its advisory role to the AAA, the

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Securities Dealers, Inc. Relating to the Arbitration Process for Claims of Employment Discrimination, Exchange Act Release No. 34-41461, 69 S.E.C. Docket 2039 (May 27, 1999). The proposed rule was approved by the SEC. *See* Self-Regulatory Organizations; Order Approving Proposed Rule Change by the National Association of Securities Dealers, Inc. Relating to the Arbitration Process for Claims of Employment Discrimination, No. 34-42061, 70 S.E.C. Docket 2341 (Oct. 27, 1998).

[197] DUNLOP & ZACK, *supra* note 1, at xix (efforts to garner interest in *Employment Protocol* had a "state and a federal focus").

[198] *Id.* at 145.

[199] *See Labor Department Notice on Expanding Use of Alternative Dispute Resolution*, 29 DAILY LAB. REP. (BNA) E17, E18 (Feb. 12, 1997).

[200] *Consumer Protocol*, *supra* note 2.

[201] *Health Care Protocol*, *supra* note 2.

[202] Stipanowich, *supra* note 7, at 896 n.383 (noting that although the AAA initiated the effort, its "representatives did not play an active role in the Committee's deliberations or drafting process"). Professor Stipanowich was a principal drafter of the protocol and its academic reporter. *See* Stipanowich, *supra* note 130, at 9.

[203] Stipanowich, *supra* note 7, at 896.

[204] *Consumer Protocol*, *supra* note 2, at *Introduction: Genesis of the Advisory Committee.*

Advisory Committee hoped that the standards it created would have a more broad reaching effect, influencing, among other things, "the evolution of consumer rules generally and the development of state and federal laws governing consumer arbitration agreements."[205] The Advisory Committee also hoped the standards would influence judicial opinions regarding the enforceability of arbitration agreements.[206]

The *Consumer Protocol*, signed in April 1998,[207] contains fifteen principles relating to alternative dispute resolution processes for consumer claims.[208] Like the *Employment Protocol*, the *Consumer Protocol* does not prohibit the use of mandatory pre-dispute arbitration clauses, although it exempts from coverage of a mandatory arbitration clause disputes that would fall within the jurisdiction of a small claims court.[209] Unlike the *Employment Protocol*, the *Consumer Protocol* explicitly requires that the ADR program be independent of the parties.[210]

The *Consumer Protocol* specifically addresses the issue regarding contract formation, which is aimed at insuring that the arbitration agreement is the product of "knowing, informed assent."[211] It has gone further than the *Employment Protocol* in this respect by requiring not only that consumers be given "clear and adequate notice of the arbitration provision and its consequences"[212] but also access to information regarding the arbitration process, including information about the differences between the arbitration process and the court process, and the cost of such process.[213] Practical suggestions are provided throughout the *Consumer Protocol* to facilitate the

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[205] *Id.*

[206] *Id.*

[207] *Id.* The *Consumer Protocol* makes it clear that it reflects the personal views of the signatories and "should not be construed as representing the policy of the designating organizations." *Id.* at *List of Signatories.*

[208] *Id.* at *Statement of Principles.*

[209] *Id.* at *Scope of the Consumer Due Process Protocol; Principle 5: Small Claims.*

[210] *Consumer Protocol, supra* note 2, at *Principle 3: Independent and Impartial Neutral; Independent Administration.* The *Health Care Protocol* also demands independence. *Health Care Protocol, supra* note 2, at *Principle 4: Neutrality and Independence.*

[211] *Consumer Protocol, supra* note 2, at *Principle 11: Agreements to Arbitrate, Reporter's Comments.*

[212] *Id.*

[213] *Id.* at *Principle 2: Access to Information Regarding ADR Program, Reporter's Comments.* Although the *Employment Protocol* only states that the agreement to arbitrate statutory employment claims be "knowingly made," it does not provide any standards or guidelines to determine whether an employee knowingly agreed to arbitrate. *Employment Protocol, supra* note 1, at 173.

implementation of the various principles and the reporter has provided comments that give insight into the rationale of the Advisory Committee with respect to each principle.

As expected, the *Consumer Protocol* "directly influenc[ed]" the consumer procedures used by the AAA.[214] The AAA adopted the *Consumer Protocol* "as the essential guidepost for the Association's participation in consumer ADR programs," and it will decline to administer cases under a program that "substantially and materially deviates" from the standards set forth in the *Consumer Protocol.* [215] The *Consumer Protocol* may also have influenced adoption of consumer due process standards by other arbitration service providers.[216]

The *Consumer Protocol* was "closely followed" in the *Health Care Protocol.*[217] That protocol was created by the Commission on Health Care Dispute Resolution. [218] That Commission was formed at a time when serious questions were raised about the appropriateness of using arbitration for the resolution of health care disputes,[219] and, as noted by its Secretary and Rapporteur, its recommendations came at a time when "the topic of health care [had] become a subject of national discourse."[220]

The Commission was made up of "the leading associations involved in alternative dispute resolution, law and medicine" (*i.e.*, the ABA, the AAA, and the American Medical Association (AMA)).[221] The goal of the

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[214] Stipanowich, *supra* note 7, at 908 (citing the AAA Arbitration Rules for the Resolution of Consumer-Related Disputes).

[215] Stipanowich, *supra* note 130, at 13.

[216] *Id.* (citing NAF's Consumer Due Process Standard Statement of Principles (2000)); *see also* JAMS Policy on Consumer Arbitrations Pursuant to Pre-Dispute Clauses; Minimum Standards of Procedural Fairness, *at* http://www.jamsadr.com/consumer _arb_std.asp. (last visited Mar. 5, 2003).

[217] Stipanowich, *supra* note 7, at 908. The *Employment Protocol* also influenced the *Health Care Protocol.* Commission on Health Care Dispute Resolution, Final Report (July 27, 1998), at 14 (hereinafter, "*Health Care Dispute Resolution Report*") (on file with author).

[218] *Health Care Dispute Resolution Report, supra* note 217, at 1.

[219] Journalist Margaret Jacobs noted that the Commission was formed after the California Supreme Court had criticized Kaiser Permanente's administration of its mandatory arbitration program. Margaret A. Jacobs, *American Arbitration Association to Change Policy on Health Care*, WALL ST. J., July 1, 1998, at B5; *see infra* note 303 and accompanying text.

[220] George H. Friedman, *Recommendations for Health Care Dispute Resolution*, 10 MED. MALPRACTICE L. & STRATEGY 1 (1998).

[221] *Health Care Dispute Resolution Report, supra* note 217, at 3–4. There were 15 persons on the Commission; each of the institutions had four representatives. The

Commission was to determine whether and under what circumstances alternative dispute resolution could be used to resolve disputes arising in privately managed health care. The Commission stated its mission as follows: "to evaluate and make recommendations as to how alternative dispute resolution should be used to provide a just, prompt and economical means of resolving disputes over access to health care treatment, and coverage in the private health plan/managed-care environment."[222]

After a year of study and investigation, where the Commission heard from numerous organizations and individuals,[223] the Commission recommended, among other things, that ADR be used to resolve disputes involving issues of health care coverage and access when those disputes were between patients and health care providers and private care plans and managed care organizations. If ADR was to be used, the Commission recommended that due process protections consistent with the *Health Care Protocol* be provided to all involved in an ADR process.

The *Health Care Protocol* contains ten principles regarding the use of ADR processes, which, like its predecessor protocols, provide minimum standards of due process for the use of ADR processes.[224] Unlike the Task Force that drafted the *Employment Protocol*, and the Advisory Committee that drafted the *Consumer Protocol*, the Commission on Health Care Dispute Resolution was able to reach a resolution regarding the permissibility of pre-dispute arbitration agreements. In disputes involving patients, the *Health Care Protocol* permits the use of binding arbitration only if the parties agree to it after the dispute arises.[225] Accordingly, the *Health Care Protocol* was the only protocol to ban the use of pre-dispute mandatory arbitration agreements when a patient was involved.

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president of the ABA, the president and chief executive officer of the AAA, and the president of the AMA co-chaired the Commission. *Id.* at 4.

[222] *Health Care Dispute Resolution Report*, *supra* note 217, at 4–5.

[223] The Commission heard from "heath care providers, patient advocacy groups, health care insurers, health insurance associations, public health officials, elder care groups and law and medical school faculty." Friedman, *supra* note 220, at 2.

[224] The 10 principles address the following: fundamentally fair process, access to information regarding ADR program, knowing and voluntary agreement to use ADR, neutrality and independence of neutral and administrating body, quality and competence of neutrals, right to representation, conduct of ADR hearings, reasonable time limits, rules governing settlement agreements in mediation or awards in arbitration, and costs. *Health Care Protocol*, *supra* note 2.

[225] *Id.* at *Principle 3:Knowing and Voluntary Agreement to Use ADR.*

The ABA adopted the *Health Care Protocol*,[226] and the AAA has now finally taken an official position regarding its adherence to the *Health Care Protocol* and has indicated that it will no longer administer cases involving patients unless the agreement to arbitrate is entered post-dispute.[227]

3. *Guidance to the Courts Regarding Enforceability of Arbitration Agreements*

Parties and courts have used the protocols in various ways when the enforceability of an agreement to arbitrate is at issue. The use of the protocols by advocates and the courts' recognition of them demonstrate that, at a minimum, the protocols have influenced, to some degree, both the manner in which arbitration agreements are evaluated and the development of the common law regarding the conditions that must be met for a court to compel arbitration.[228]

One of the first courts to discuss the *Employment Protocol* was the D.C. Circuit in *Cole v. Burns International Security Services*.[229] There, the court enforced an arbitration agreement requiring an employee to arbitrate his Title VII claim pursuant to the rules of the AAA.[230] The agreement was enforceable only because the court found that it satisfied certain safeguards that were necessary for the employee to adequately vindicate his statutory rights.[231] The court found support for its assertion that certain safeguards were needed when arbitration is imposed as a condition of employment in, among other things, the findings of the Dunlop Commission[232] and the *Employment Protocol*.[233]

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[226] *See* William K. Slate II, *ADR and the Health Care Challenge*, DISP. RESOL. J., Aug. 1999, at 1 (1999) (noting that the ABA's policy-making body endorsed the *Health Care Protocol*).

[227] *See* http://www.adr.org/index2.1.jsp?JSPssid=15728. The AAA's policy was effective as of January 1, 2003. It is curious that the AAA did not institute this policy change earlier. An article published by the Wall Street Journal in 1998 indicated that the AAA was "expected to announce that it will change its policy and refuse to administer mandatory arbitrations of patients' health-care disputes." Jacobs, *supra* note 219, at B5.

[228] One of the stated purposes of the *Consumer Protocol* is to "influence judicial opinions addressing the enforceability of arbitration agreements pursuant to existing state or federal law." *Consumer Protocol*, *supra* note 2, at *Introduction: Genesis of the Advisory Committee.*

[229] Cole v. Burns Int'l Security Serv., 105 F.3d 1465, 1483 n.11 (D.C. Cir. 1997).

[230] *Id.* at 1482–83.

[231] *Id.*

[232] *See supra* notes 89–92 and accompanying text.

[233] *Cole*, 105 F.3d at 1483 n.11.

However, the court parted company with the *Employment Protocol* with respect to one particular standard, the allocation of the arbitrator's fee.[234] The court indicated that it would only uphold the agreement to arbitrate because it could be interpreted as requiring the employer to bear the full burden of the arbitrator's fee.[235] As stated, because of its concern regarding impartiality, the *Employment Protocol* provides that the parties share those fees.[236] The court rejected that justification for requiring cost sharing: "If an arbitrator is likely to 'lean' in favor of an employer . . . it would be because the employer is a source of future arbitration business . . . and not because the employer alone pays the arbitrator."[237] The court's development of a standard stricter than that contained in the *Employment Protocol* suggests that the *Employment Protocol* may be, as one of its drafter's articulated, a "first step" in the evolution of due process standards for the conduct of arbitration proceedings involving public statutory rights.[238]

An arbitration agreement that did not comply with the standards articulated in the *Employment Protocol* was found to be unconscionable and a violation of public policy in *Hooters of America, Inc. v. Phillips*.[239] There, plaintiff offered affidavits of arbitration experts that, among other things, compared the rules of the arbitration scheme that plaintiff was required to follow to the standards contained in the *Employment Protocol* and in the rules of certain arbitration service providers.[240] That comparison led those experts to conclude that they would refuse to arbitrate the discrimination claim under the rules applicable in plaintiff's arbitration agreement.[241] Although the court did not specifically hold that Hooters' arbitration rules were void simply because they failed to comply with the *Employment Protocol*, the standards set forth in the *Employment Protocol* provided a

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[234] *Id.* at 1485–86.

[235] *Id.*

[236] *Employment Protocol*, *supra* note 1, at 177; *see also supra* notes 179–81 and accompanying text (regarding the *Employment Protocol's* treatment of fees if one party is economically unable to equally share the fees).

[237] *Cole*, 105 F.3d at 1485.

[238] *Arbitration: Academy Board Endorses ADR Task Force Prototype*, 104 DAILY LAB. REP. (BNA) A-5 (May 31, 1995) ("Zack called the work of the ADR task force a first step in pointing the way to a more reasonable and equitable system.").

[239] Hooters of Am., Inc. v. Phillips, 39 F.Supp.2d 582 (D.S.C. 1998), *aff'd.* 173 F.3d 933 (4th Cir. 1999).

[240] *Id.* at 600. The rules of the AAA, the NASD and the FMCS were compared. *Id.*

[241] *Id.*

benchmark for the court in determining the appropriate rules for the conduct of an arbitration.[242]

Justice Ginsburg, in her dissenting opinion in *Green Tree Financial Corp.-Alabama v. Randolph*, also noted the utility of the protocols, and the rules enacted by the providers to effectuate the principles set forth in the protocols, as guides to the industry standards.[243] There, a purchaser of a mobile home signed a Manufactured Home Retail Installment Contract and Security Agreement which required arbitration of "all disputes, claims or controversies arising from or relating to this Contract . . . . "[244] In response to Randolph's class action alleging that Green Tree had violated the Truth in Lending Act, Green Tree moved to compel arbitration pursuant to the arbitration agreement.[245] Randolph asserted that she lacked the financial resources to arbitrate.[246] The arbitration agreement was silent as to how the costs of arbitration were to be allocated between the parties.[247] As will be recalled,[248] the Supreme Court held that that silence alone was not reason enough to make the arbitration agreement unenforceable.[249] Because the record did not demonstrate what the costs would be, the Court found that Ms. Randolph failed to meet her burden of proving the likelihood that the costs of arbitration would be prohibitively high.[250]

Justice Ginsburg believed that the drafter of the agreement could have filled in the gap regarding the cost of arbitration, by providing that the arbitration would be conducted in accordance with the rules of an arbitration

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[242] The district court in *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 995 F. Supp. 190 (D. Mass. 1998), *aff'd.*, 170 F.3d 1 (1st Cir. 1999), also used the *Employment Protocol* as a basis upon which to judge the fairness and independence of the NYSE arbitration system. Unlike the *Employment Protocol* which "mandate[d] appointment procedures that give each party scrupulously equal rights in the process [of arbitrator selection]," the NYSE arbitral system lacked independence and was dominated by the NYSE itself, an organization to which the defendant belonged." *Id.* at 208, 212. In its affirmation, the First Circuit expressly "disavowed" the district court's conclusion that the agreement was not enforceable because of structural bias in the NYSE forum. *Rosenberg*, 170 F.3d at 4.

[243] Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79, 95 (2000) (Ginsburg, J., dissenting).

[244] *Id.* at 83 n.1.

[245] *Id.*

[246] *Id.* at 83–84.

[247] *Id.* at 89.

[248] *See supra* notes 69-71 and accompanying text.

[249] *Green Tree*, 531 U.S. at 91.

[250] *Id.* at 90–91.

service provider.[251] Citing, among other things, the *Consumer Protocol*, Justice Ginsburg noted that other national arbitration organizations had developed similar rules mandating fair cost and fee allocation.[252] She stated: "It may be that in this case, as in *Gilmer*, there is a standard practice on arbitrators' fees and expenses, one that fills the blank space in the arbitration agreement."[253]

That standard practice arguably does exist and can be traced to the *Consumer Protocol*, which first articulated the need for "reasonable cost" in arbitrations involving consumers,[254] and which influenced the development of rules by providers that were consistent with this principle.[255]

As the foregoing cases demonstrate, the protocols have thus far served two functions for the courts. They inform the courts when articulating their own standards of due process necessary for an arbitration process to effectively vindicate a party's statutory rights and they provide a model or standard from which to judge certain arbitration practices and procedures. This last function is precisely why some industries choose self-regulation.[256]

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[251] *Id.* at 95.

[252] *Id.*

[253] *Id.*; *cf.* Green Tree Fin. Corp. v. Wampler, 749 So.2d 409, 417 (Ala. 1999) (concluding that because arbitration agreement did not incorporate *Consumer Protocol* or rules of AAA with respect to arbitration of consumer claims, "the AAA rules and protocol could serve only as a standard against which to test evidence of custom and usage under the arbitration clause in the Wampler's Security Agreement").

[254] *Consumer Protocol*, *supra* note 2, at *Principle 6: Reasonable Cost.* Principle 6 provides:

> 1. Reasonable Cost. Providers of goods and services should develop ADR programs which entail reasonable cost to Consumers based on the circumstances of the dispute, including, among other things, the size and nature of the claim, the nature of goods or services provided, and the ability of the Consumer to pay. In some cases, this may require the Provider to subsidize the process.
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> 2. Handling of Payment. In the interest of ensuring fair and independent Neutrals, the making of fee arrangements and the payment of fees should be administered on a rational, equitable and consistent basis by the Independent ADR Institution.

Id.

[255] *See supra* notes 214–16 and accompanying text. Indeed, some providers have gone beyond the *Consumer Protocol* and have put a cap on the costs to the consumer for certain disputes. *See infra* note 460 and accompanying text.

[256] *See infra* note 450–52 and accompanying text.

4. *Guidance to Legislatures*

On the federal level, numerous bills have been introduced during the last decade to combat many of the concerns that arise when arbitration in the consumer or employment context is imposed on a take-it-or-leave-it basis.[257] The protocols played a significant role in the formation of one bill in particular. In October 2000, Senator Sessions introduced the *Consumer and Employee Arbitration Bill of Rights*.[258] That bill sought to amend the FAA to provide certain rights to consumers and employees when required to arbitrate a dispute.[259] The bill was "based on the consumer and employee due process protocols of the American Arbitration Association."[260] Although the bill did not make it out of committee, it demonstrates the impact the protocols can have on the development of the formal law. Indeed, an industry may develop standards or "best practices" in order to influence subsequent legislation.[261]

The protocols also appear to have played a role, albeit a limited one, in the RUAA.[262] In 1995, the National Conference of Commissioners on

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[257] *See* Menkel-Meadow, *supra* note 185, at 964 n.69.

[258] S. Res. 3210, 106th Cong. (2000).

[259] In addition to requiring that the arbitration clause in the consumer or employment contract be printed in bold, capital letters, state whether participation is mandatory, identify a source that can be contacted to learn more information about the arbitration process, particularly the costs and fees associated with it, and expressly give the consumer notice that he or she may instead go to small claims court if the claim is within the jurisdiction of the court and is less than $50,000, the bill also provided procedural safeguards to those required to arbitrate. *Id.*

The procedural rights the bill sets forth included: the right to a competent and neutral arbitrator, administration by an independent provider, application of the law that would govern the dispute if the dispute had been brought in court, as well as the right to receive the same relief that would be available in court, the right to be represented by an attorney, access to information relevant to the dispute, a fair hearing at a convenient location (unless the consumer or employee agrees to an electronic or telephonic hearing) at which the parties can present evidence, cross examine witnesses, and request a record and a timely written decision explaining the factual and legal basis for the decision. The arbitrator was also given the authority to provide for reimbursement of the arbitration fees to the claimant as part of the remedy and to waive, defer, or reduce the fee in cases of extreme hardship. *Id.* In addition to providing such rights, the bill also provided the parties with a means to enforce those rights. *Id.*

[260] 146 CONG. REC. S10619, 10625 (2000) (statement of Sen. Sessions).

[261] *See, e.g.*, Ian Maitland, *The Limits of Business Self-Regulation*, 27 CAL. MANAGEMENT REV. 132, 138 (1985) (noting that standards of organizations may become basis for subsequent legislation).

[262] Revised Uniform Arbitration Act §§ 1-33, 7 U.L.A. 1–33 (Supp. 2002). The original Uniform Arbitration Act, promulgated in 1955, is deemed one of the more successful of the uniform laws. Thirty-four states and the District of Columbia have fully

Uniform Laws (NCCUSL) began discussing the "feasibility of revising the UAA"[263] to modernize it, clarify certain ambiguous provisions, and to codify existing case law.[264] After significant work by numerous persons and organizations,[265] the NCCUSL officially approved the RUAA in August 2000.[266] Since such approval, the RUAA has been endorsed by, among others, various sections of the ABA, and by numerous arbitration service providers, including the AAA, JAMS, and NAF.[267] By the end of 2002, six states had adopted the RUAA,[268] and an additional thirteen states were considering the statute.[269]

While the drafters were concerned about the fairness of the forum for all participants in the arbitration process,[270] it recognized that that issue was more acute for those who were required to arbitrate because the clause was contained in a contract of adhesion. However, because of the concern about preemption,[271] the drafters believed that, with the exception of certain

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passed it and an additional 14 states passed laws that were similar to it. *Id.* at Prefatory Note.

[263] Matthew E. Braun, *The Revised Uniform Arbitration Act*, 18 OHIO ST. J. ON DISP. RESOL. 237, 237 (2002).

[264] *See* Timothy J. Heinsz, *The Revised Uniform Arbitration Act: An Overview*, DISP. RESOL. J., May-July 2001 at 25, 28.

[265] Participants in the process of revising the UAA included "liaisons from several ABA committees, . . . a variety of arbitral organizations such as AAA, JAMS, CPR and NAF, and observers from a number of groups interested in the continued use of arbitration—representatives from the securities, construction and insurance industries." Sarah Rudolph Cole, *The Revised Uniform Arbitration Act, Is it the Wrong Cure?* DISP. RESOL. MAG., Summer 2002, at 10, 10–11.

[266] *Id.* at 10.

[267] *Id.* at 13 n.6.

[268] Some of those states adopted the RUAA with revisions. *See The RUAA Moves Toward National Passage*, DISP. RESOL. J., MAY–July 2002, at 5, 5.

[269] *Id.*

[270] *See* Stephen L. Hayford & Carroll E. Neesemann, *A Response to RUAA Critics: Codifying Modern Arbitration Law, Without Preemption*, DISP. RESOL. MAG., Summer 2002, at 15, 15. The authors, an academic advisor to the NCCUSL drafting committee and an official Observer at all meetings of the NCCUSL drafting committee, state:

> From day one, the RUAA Drafting Committee of the . . . NCCUSL took as its charge the creation of a model for modern state arbitration statutes that would advance the state of the practice of arbitration and help make arbitration a truly fair and viable substitute for traditional litigation in a court of law for anyone involved in the process.

Id.

[271] *See infra* note 347 and accompanying text (discussing the preemptive force of the FAA).

procedures that could not be waived by the parties, they were not able to make any more specific rules for or limitations on arbitration when it is the result of a contract of adhesion.[272] Instead, the drafters in the comment section looked to state contract law for the determination of whether the mandatory arbitration agreement should be enforced because it was unconscionable.[273] In that connection, the drafters suggested that the protocols be used by the courts as their "guideposts" in such determinations:

> [the drafters of the RUAA] settled on a commentary on enforcement of arbitration agreements identifying the special problems associated with standardized adhesion contracts and citing various due process protocols negotiated by affected public and private industry groups as guideposts for courts in considering questions of unconscionability in contracts of adhesion. [274]

Accordingly, the content of those protocols will presumably influence state legislatures who are reviewing and debating revisions to their state arbitration laws.

5. *Protocol's Affect on Outcomes*

Some preliminary evidence exists that suggests that the outcomes for claimants in employment arbitration have improved since adoption of the *Employment Protocol.* Professor Lisa Bingham and Shimon Sarraf studied and compared certain employment arbitration results at the AAA before and after the AAA's incorporation of the principles of the *Employment Protocol* in its rules governing employment arbitration.[275] The authors found that "employers arbitrating pursuant to an adhesive arbitration clause in a personnel manual after the Due Process Protocol have less success than before the Due Process Protocol."[276] That finding led them to conclude that

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[272] Hayford & Neesemann, *supra* note 270, at 16.

[273] "[T]he law of unconscionability can do, on a case-by-case basis, what the RUAA could not as a uniform act." *Id.* One scholar has asserted that the RUAA does not do enough to protect those required to arbitrate pursuant to a mandatory arbitration agreement. *See* Cole, *supra* note 265, at 12; *see also* Sarah Rudolph Cole, *Uniform Arbitration: "One Size Fits All" Does Not Fit*, 16 OHIO ST. J. ON DISP. RESOL. 759 (2001).

[274] Stipanowich, *supra* note 7, at 894.

[275] Bingham & Sarraf, *supra* note 135, at 1 (abstract).

[276] *Id.*

self-regulation of arbitration through the adoption of the *Employment Protocol* "is making a difference in employment arbitration."[277]

This study looked at the overall pattern of outcomes produced by the arbitration process in a sample of cases that were decided under the rules used by the AAA from January 1, 1993 to June 1, 1996, a total of 265 cases.[278] Of those cases, fifty-nine were decided pursuant to AAA rules that were subject to the *Employment Protocol.* Although employer success overall improved after incorporation of the *Employment Protocol*, the evidence showed that "the likelihood of employer success decreased .206 times with the presence of the protocol and a personnel handbook, holding all other independent variables constant."[279] The authors opined that the reason for that result is that the AAA successfully screened handbook plans that denied employees the basic due process protections contained in the *Employment Protocol.*[280]

The preliminary results are favorable regarding the impact on outcomes from adoption of the *Employment Protocol.* However, additional research is needed in order to conclusively state that the protocols have removed the procedural disadvantages that may have impacted on an employee's chance of success in arbitration.

III. THE PROTOCOLS AS SELF-REGULATORY INSTRUMENTS

As Part II demonstrates, many good reasons led to the creation of the protocols. The standards set forth in them sought to fill the gap left open by the Supreme Court's decision in *Gilmer.* The standards also sought to preserve and maintain arbitration's image and reputation as a useful, effective alternative dispute resolution process, one that could provide those persons who are priced out of the current judicial system a viable alternative forum. The protocols also sought to level the playing field for those who are required to go to arbitration as a result of the unilateral imposition of arbitration in a contract of adhesion.

The protocols are clearly an attempt to regulate the arbitration process. Their role as a self-regulatory instrument or as a self-policing tool is apparent

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[277] *Id.*

[278] The authors did not control for the merits of the actual case. They merely identified the source of the agreement to arbitrate and the nature of the dispute as an employment dispute. *Id.* at 13.

[279] *Id.*

[280] *Id.*

and has been noted by many commentators.[281] Lacking the force of law, their effectiveness in accomplishing the goals set forth above is dependent upon a number of related factors: (i) voluntary commitment to the standards by arbitrators and arbitration service providers; (ii) the quality of the standards set forth in the protocol; (iii) the ability to monitor adherence to the protocols; and (iv) mechanisms to enforce such adherence by those who have agreed to be bound by the protocols.[282] As we shall see, issues exist with respect to each of these four factors that weaken the protocols' effectiveness. Indeed, the effectiveness of the protocols is fundamentally undermined by the lack of monitoring and enforcement mechanisms.

While it is undeniable that the protocols remain useful tools that have already gone a long way to imposing certain fairness standards in a multitude of arbitrations, their efficacy can be greatly improved and their standards strengthened if monitoring and enforcement mechanisms are made part of the protocols. The impact such mechanisms could have on the usefulness of the protocols as well as on the manner in which such mechanisms could be developed is discussed below. Also discussed below are issues concerning the standards themselves, which, too, impacts on the effectiveness of the protocols.

A. *Self-Regulation as a Means to Preserve and Protect Arbitration as a Dispute Resolution Process*

Self-regulation through the adoption of standards of conduct is a means to achieve collective action. "Self-regulation, self-enforcing institutions, self-governance and communitarian regulation are all terms adopted to describe self-organized attempts at collective action without direct intervention by the

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[281] *See, e.g.*, Ackerman, *supra* note 83, at 69 n. 142 (citing to *Consumer Protocol* and JAMS's *Policy on Employment Arbitration, Minimum Standards of Procedural Fairness*, author concludes: "[i]t appears that the arbitration community has engaged in some self-policing"); Bingham & Sarraf, *supra* note 135, at 2 ("Due Process Protocol represents an effort to level the playing field [between repeat player and employee] by introducing self-regulation and procedural safeguards into employment arbitration."); Alan S. Kaplinsky & Mark J. Levin, *Consumer Financial Services Arbitration: Last Year's Trend Has Become This Year's Mainstay*, 54 BUS. LAW. 1405, 1408 (1999) ("The protocols and standards adopted by the AAA, JAMS, and the NAF exemplify the adage that it is better to regulate oneself than to be regulated by others"); Jean R. Sternlight, *Is the U.S. Out on a Limb? Comparing the U.S. Approach to Mandatory Consumer and Employment Arbitration to that of the Rest of the World*, 56 U. MIAMI L. REV. 831, 842 (2002) (citing protocols as an example of how arbitration organizations have "engaged in some self-regulation").

[282] *See* ELINOR OSTROM, GOVERNING THE COMMONS 27 (1990).

state."[283] Regulation of conduct can be done to "avoid a common threat or to provide a common good."[284] In the case of the protocols, standards were developed to achieve both goals; the drafters wanted to avoid the threat to arbitration's image[285] and they wanted to be instrumental in providing a process that they believed would provide a quicker, more cost-effective means of dispute resolution.[286]

The promulgation of the protocols to regulate the collective action of the arbitration industry, including both individual arbitrators and arbitration service providers, is not unlike the initiatives in collective action that have been described by Professor Ostrom in her book, *Governing the Commons*.[287] There, the author suggests the use of cooperative action to avoid the inevitable tragedy of the commons, which occurs when numerous persons use a common resource to the point of causing the degradation of the resource.[288] Such degradation occurs because rational users of the resource

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[283] Andrew King & Michael J. Lennox, *Industry Self-Regulation Without Sanctions*, 43 ACAD. OF MGMT. J. 698, 698 (2000) (citations omitted).

[284] *Id.*; *see also* Roberta S. Karmel, *Securities Industry Self-Regulation—Tested By The Crash*, 45 WASH & LEE L. REV. 1297, 1300 (1988) ("Self-regulation, like government regulation, generally falls into three categories: promotional, standard-setting, and disciplinary.").

[285] Organizations involved in the business of providing arbitration services would clearly benefit if courts and others continued to favor arbitration as a dispute resolution process.

[286] "Regardless of their individual performance, members of an industry are often tarred by the same brush." King & Lennox, *supra* note 283, at 699; *see also Arbitration: Academy Board Endorses ADR Task Force Prototype*, 104 DAILY LAB. REP (BNA) D11 (May 31 1995):

> The fourth pressure to which Zack pointed "is the increasing risk that . . . labor-management arbitration will lose its credibility in the fact of unilaterally imposed arbitration." *** "We must undertake to counter the perception that arbitration is 'rigged,' and to assure that claimants under such employer promulgated schemes be accorded due process protections, to provide fair treatment, as well as to strive for the goal that the process of arbitration, theirs as well as ours, be regarded as equitable with adequate due process protections.

[287] OSTROM, *supra* note 282, at 25.

[288] "'[T]he tragedy of the commons' has come to symbolize the degradation of the environment to be expected whenever many individuals use a scarce resource in common." *Id.* at 2. Although noting that the tragedy of the commons had been noted by Aristotle, the author cites to the famous article by Garret Hardin, which appeared in *Science* in 1968. In that article, Hardin describes the tragedy of the commons by reference to herders who use a common pasture to graze their animals. Ostrom explains that under Hardin's analogy, "[e]ach herder is motivated to add more and more animals because he receives the direct benefit of his own animals and bears only a share of the

use it in such a manner as to maximize the benefits they derive from it. They will be motivated to use the resource as much as possible because they will individually benefit from such overuse and the cost to the resource from overuse by all users will not be born fully by each user but will be shared by all users, at a later date. The answer to this paradox, "where individually rational strategies lead to collectively irrational outcomes,"[289] Ostrom notes, is typically one of two conflicting solutions: government regulation or private ownership of the common resource.[290] Ostrom challenges those two solutions and suggests a third: cooperative action by the users of the common-pool resource, which may or may not use external institutions.[291]

In many respects, the groups responsible for the protocols have sought to use them to protect a common-pool resource, arbitration, or, more accurately, the favored treatment the Supreme Court has bestowed upon arbitration since at least 1983,[292] from the inevitable degradation of it by abusive arbitration provisions and practices. As was clear to the drafters of the protocol, there were very few legal restrictions on the use of arbitration clauses and little regulation of arbitration practice. The Supreme Court had endorsed arbitration for statutory disputes and had not found any statutory claim inarbitrable. Nor had the Court provided any specific rules regarding the procedures that must be present in order for the arbitral process to adequately vindicate a claimant's statutory rights. Thus, even today, anyone can use the common resource and take advantage of it by requiring arbitration whenever a contractual relationship exists, whether it be done directly, by specific inclusion of the clause in a written contract between two or more parties, or

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costs resulting from overgrazing." *Id.* at 2. In describing the destruction that takes place from such overgrazing, Ostrom cites Hardin:

> Therein is the tragedy. Each man is locked into a system that compels him to increase his herd without limit—in a world that is limited. Ruin is the destination toward which all men rush, each pursuing his own best interest in a society that believes in the freedom on the commons.

Id. (citing G. Hardin, *The Tragedy of the Commons*, SCIENCE 162: 1243–48).

[289] *Id.* at 6. The notion that rational self-interested individuals will be unable to achieve collective benefits has been detailed by Mancur Olson in *The Logic of Collective Action*. There, Olson concludes that contrary to popular thought, "unless the number of individuals in a group is quite small, or unless there is coercion or some other special device to make individuals act in their common interest, *rational, self-interested individuals will not act to achieve their common or groups interests*." MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION 2 (1965).

[290] OSTROM, *supra* note 282, at 9, 12.

[291] *Id.* at 15.

[292] The Supreme Court first interpreted the FAA as evidencing a federal policy favoring arbitration in *Moses H. Cone Mem'l. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

indirectly, by inclusion of the clause in, for example, an employee's handbook, or the material accompanying delivery of a product or a bill for services.[293] As rational users, some imposing arbitration used it to extract as many benefits as possible for themselves. Accordingly, they attempted to use the process to obtain advantages which they could not have achieved in a judicial forum. Such advantages ranged from limiting the remedies available to claimants, to shortening the statute of limitations, to unilateral selection of "neutrals."[294] Such use of the resource, the drafters of the protocols realized, would lead to its destruction.

The destruction of arbitration could occur in a number of ways. For example, in response to abusive arbitration provisions, Congress could strictly regulate its use by, among other things, prohibiting pre-dispute arbitration clauses. Arbitration could lose its favored status in the Supreme Court. The Court could find the process as currently practiced incapable of adequately vindicating statutory rights. It could reverse its decision in *Southland Corp. v. Keating*,[295] regarding the FAA's preemption of state laws that prohibit certain arbitration agreements, as it has been repeatedly urged to do so,[296] which would give states the power to regulate arbitration and the use of the arbitral process. Before these events occurred, the creators of the protocols sought to prevent arbitration's demise by calling for collective action from those responsible for providing arbitration services and by regulating the use of the resource by setting forth specific rules to govern the procedures of arbitration. Ostrom believes that, under certain circumstances, such cooperative action can be an effective means in which to govern the use of a common pool resource so that the users of the resource can obtain long-term collective benefits.[297]

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[293] *See infra* note 365 and accompanying text (discussing such practices).

[294] *See, e.g.*, Hooters of Am., Inc. v. Phillips, 39 F.Supp.2d 582 (D.S.C. 1998), *aff'd*, 173 F.3d 933 (4th Cir. 1999).

[295] Southland Corp. v. Keating, 465 U.S. 1 (1984).

[296] One of the more recent attempts to persuade the Court to reverse the *Southland* decision came in connection with the Court's decision in *Green Tree Fin. Corp. v. Bazzle*, 123 S. Ct. 2402 (2003), a case concerning the appropriateness of class arbitration. *See* Brief of Law Professors as Amici Curiae in Support of Respondents, Green Tree Fin. Corp. v. Randolph, 123 S.Ct. 2402 (2003) (No. 02-634).

[297] OSTROM, *supra* note 282, at 29.

B. *Adequacy of the Standards to Produce Credible Commitments*

1. *Commitments Generally*

It is obvious that the success of the protocols in regulating arbitration and bringing about collective action so to preserve arbitration is primarily dependent upon arbitrators' commitment to follow the protocols and to decline to arbitrate a claim when the arbitration provided for in the agreement does not adhere to the standards contained in the protocols. In order for any self-regulatory scheme to work, commitments to follow the rules have to be obtained by those directly involved in the industry or business or those who appropriate the common pool resource.[298] Two issues arise in this connection: obtaining commitments from enough of the firms involved to make the self-regulatory scheme work and making sure the commitments obtained are credible.

Joint collective benefits cannot be achieved and self-regulation cannot succeed unless most firms or players in the industry agree to participate.[299] Failure of a part of the industry to sign onto the regulatory scheme will put those who are willing to agree to sign on to it at a competitive disadvantage.[300] Unless the "government intervenes directly to curb the activities of non-participants," the self-regulatory scheme cannot work.[301]

Commitments by individuals or firms in the arbitration industry is not as straight forward as it may be in other industries. There are numerous ways a person or persons can be retained as an arbitrator. In an agreement to arbitrate, the parties can mutually agree and identify the person or persons whom they want to resolve their dispute. Each party can also select an arbitrator of their choosing and those arbitrators may select the third arbitrator. Persons selected can be experienced arbitrators and members of a professional alternative dispute resolution organization, or they can be anyone the parties feel comfortable with in resolving the dispute.[302] There is no requirement that the selected person be familiar with the law of arbitration, or be associated with any of the major providers of arbitration services. There is also no requirement that the parties select persons who are familiar with, or who have agreed to abide by, the protocols or any other

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[298] *Id.* at 43–44.

[299] Neil Gunningham & Joseph Rees, *Industry Self-Regulation: An Institutional Perspective*, 19 LAW & POL'Y 363, 394 (1997).

[300] *Id.*

[301] *Id.*

[302] Of course, the arbitrator cannot be biased; if that is the case, the award can be vacated under the FAA. 9 U.S.C. § 10(a) (1994).

codes applicable to arbitrators, such as the Code of Ethics promulgated by the AAA and SPIDR. Indeed, the ability to select the decisionmaker is a hallmark of arbitration and that freedom has not been constrained by law. Entire organizations[303] or industries can also develop their own arbitration programs and have, in fact, done so.[304] There is no requirement that such programs be "independent" of the parties' industry or business.

Another way an arbitrator can be retained is when the parties agree that the arbitration will proceed in accordance with the rules of a particular arbitration service provider.[305] In that connection, the provider will administer the arbitration and the arbitrator(s) may be selected from the

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[303] For example, Kaiser Permanente administered its own arbitration system until a blue ribbon task force, created in the wake of criticism of the program, recommended the creation of an independent administer to supervise the program. *See* Engalla v. Permanente Med. Group, Inc., 938 P.2d 903, 922 (Cal. 1997); The Kaiser Permanente Arbitration System: A Review and Recommendations for Improvement, submitted by The Blue Ribbon Advisory Panel on Kaiser Permanente Arbitration (January 1998) (on file with author).

[304] For example, the securities industry has administered its own arbitration system since at least 1872, when the NYSE began offering arbitration for the resolution of disputes between its members and their customers. The American Stock Exchange commenced its program in 1964, and the NASD began in 1968. *See* PHILIP J. HOBLIN, JR., SECURITIES ARBITRATION PROCEDURES, STRATEGIES, CASES 1–2 (2d ed. 1992).

[305] Arbitration service providers have undergone a significant change "since the days when the AAA was virtually unique as an institutional provider of conflict resolution services." Thomas J. Stipanowich, *Behind the Neutral—A Look at Provider Issues*, *in* ARBITRATION OF CONSUMER FINANCIAL SERVICES DISPUTES 813, 816 (1999). According to Professor Stipanowich, today's landscape of providers of ADR services includes:

> complex, multifaceted organizations of national and international scope to ad-hoc arrangements among individuals. Somewhere in between are more specialized services marketing particular procedures (such as adherence to rules of law and evidence and written arbitration awards) or "celebrity" panelists (e.g. emeritus judges); groups that have evolved to serve the special needs of a community, industry or business sector; and mom-and-pop mediation services.

Id.

The critical role arbitration service providers play in the administration of private justice has led to the promulgation of "the first-ever set of guidelines for ADR Provider organizations, designed to suggest "best practices" and "baseline" measures for provider organizations in the provision of arbitration and other ADR services." Menkel-Meadow, *supra* note 185, at 965; *see* Stipanowich, *supra* note 130, at 13. In those guidelines, an "ADR Provider Organization" is defined to include "any entity or individual which holds itself out as managing or administering dispute resolution or conflict management services." Symposium, *CPR-Georgetown Commission on Ethics and Standards in ADR, Principles for ADR Provider Organizations*, 56 U. MIAMI L. REV. 983, app. A at 987 (2002) [hereinafter *Principles for ADR Provider Organizations*].

roster of arbitrators maintained by the provider. Those on the roster will typically be persons who have been trained as arbitrators and who have agreed to abide by the provider's rules, including those rules that reflect the protocols and the ethical principles the arbitrator should follow in connection with the provision of arbitration services. The identification and selection of neutrals is one of the most important functions engaged in by providers.[306]

While the major arbitration service providers have formally or informally endorsed the protocols, crafted rules to reflect the due process principles set forth in the protocols, and agreed to decline to provide arbitration services if the agreement does not comport with the protocols,[307] there is no way to ascertain the voluntary commitment to the protocols by individual arbitrators who are not selected through a major service provider. This is a troubling notion considering that the vice-president of a major arbitration service provider in an interview concerning proposed legislation in California seeking to regulate the alternative dispute resolution industry, indicated that most of the consumer arbitrations were being conducted by individual neutrals and not by the major providers.[308] If it is true that most arbitrators are not bound to follow the principles of the protocols,[309] and arbitrations are occurring where due process protections may be absent or subject to the whim of the arbitrator or one of the parties, it is clear that the protocols have failed as a self-regulatory instrument and government intervention is needed to regulate the industry.

The failure of individual neutrals to commit to the protocols may be due to what has been termed the "assurance problem."[310] This theory posits that individual firms refuse to commit to a set of standards not because they have calculated that the benefits they will receive from not following the standards will be greater than the benefits from following the standards, but "because [they are] unable to obtain the necessary assurance that other firms will

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[306] Stipanowich, *supra* note 7, at 875.

[307] *See supra* notes 183–196 and accompanying text.

[308] Kevin Livingston, *Taking on Arbitration*, THE RECORDER, March 12, 2002, at 1. It is difficult to ascertain whether the major arbitration service providers are handling most of the arbitrations that are occurring in the employment and consumer contexts. As mentioned previously, Professor Menkel-Meadow has stated that the "vast majority" of arbitrations occurring in the United States are sponsored in some manner by provider organizations. *See* Menkel-Meadow, *supra* note 185, at 965.

[309] It is of course possible that a neutral, unaffiliated with a major arbitration service provider, is nevertheless committed to the protocols because he or she is a member of an ADR professional organization.

[310] *See, e.g.*, Ian Maitland, *supra* note 261 at 134 (citing C. Ford Runge, *Institutions and the Free-Rider: The Assurance Problem in Collective Action*, 54 J. POL., 154–81 (1984)).

contribute their fair share."[311] With respect to the protocols, even if all working arbitrators agreed to follow the protocols, there is nothing in the protocols to provide assurance that those individuals and firms do, in fact, what they promise. There are no monitoring devices and no devices to compel compliance by those who have previously agreed to be bound by the protocols. The lack of those mechanisms may make a firm reluctant to comply and be put at a disadvantage when others in the industry are not being held to their promises. "Individuals frequently are willing to forgo immediate returns in order to gain larger joint benefits when they observe many others following the same strategy."[312] Without monitoring, it is impossible to "observe" other individual neutrals following the protocols.

The assurance problem is much more acute for individual neutrals than it is for large providers. Indeed, the major providers have been very public concerning their commitment to follow the protocols and their willingness to decline to arbitrate a claim if the process does not comply with the protocols. An individual neutral may have to turn away significant business in order to comply with the protocols. It is likely that those insisting on an arbitration that does not comply with the protocols will be able to find a neutral who will nonetheless hear and administer the case. Accordingly, individual neutrals may be unwilling to forego that short term financial benefit until they are assured that others in the industry will do the same, regardless of the fact that collective action may ultimately provide them with benefits (such as enhancement of arbitration's image, which could lead to additional business, or no government regulation) greater than they could receive when acting independently (and contrary to the protocols).[313] Without that assurance, commitment to the protocols is hard to obtain from individual neutrals and that failure may even impact on the commitment of large providers.

It is not surprising that the large arbitration service providers readily agreed to be bound by the protocols, and in some respects, were the driving force behind their creation. These firms have a "high public profile"; the consequence to them of a poor record of implementing fair arbitration programs is both "substantial and visible."[314] In addition, these firms, unlike individual neutrals, "can usually afford to consider a range of goals in addition to short-term profits."[315] However, the commitment of a large firm

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311 *Id.*

312 OSTROM, *supra* note 282, at 39.

313 "[T]hose firms that are economically marginal (generally small—to medium-sized enterprises) cannot afford the luxury of a longer-term view." Gunningham, *supra* note 9, at 65.

314 *Id.* at 66.

315 *Id.*

can be challenged when others refuse to commit or refuse to abide by their commitments because they may no longer receive the benefits anticipated by self-regulation:

> If a significant number of smaller companies do not comply, then large companies lose much of the incentive to continue their own voluntary action. If the public fails to distinguish "good" and "bad" companies, but rather blames the industry as a whole . . . then good companies will suffer the stigma, lack of credibility, and public backlash caused by the misdeeds of noncomplying companies.[316]

Accordingly, if voluntary compliance with the protocols by the large providers is incapable of preserving arbitration's image because of the conduct of individual providers, or of making arbitration an attractive alternative to the judicial system for the resolution of disputes, the large providers will lose their incentive to comply with the protocols. At that point, unless Congress takes action, regulation of arbitration will occur only on an ad hoc basis by the judicial system when it is called upon to enforce an agreement to arbitrate or to determine the legality of an arbitrator's award challenged pursuant to the FAA.

2. *Obtaining Credible Commitments*

A related aspect of the commitment issue is ensuring that the commitments received are "credible." A credible commitment is found when a firm foregoes opportunistic behavior and follows the self-regulatory scheme. "In every group there will be individuals who will ignore norms and act opportunistically when given a chance. There are also situations in which the potential benefits will be so high that even strongly committed individuals will break norms."[317]

Those who act opportunistically are sometimes referred to as "free-riders." These are firms that "take advantage of the willingness of other firms" to follow the scheme and expend the necessary resources to do so.[318] Because they "cannot be excluded from the benefits that the others provide,"[319] their decision to refrain from complying is thus considered a "matter of rational, economic self-interest;"[320] they reap the benefits of self-regulation without paying the cost. Unless a self-regulatory scheme has

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316 *Id.* at 67.

317 OSTROM, *supra* note 282, at 36.

318 Gunningham, *supra* note 9, at 67.

319 OSTROM, *supra* note 282, at 6.

320 Gunningham, *supra* note 9, at 67.

within it mechanisms to deter firms or individuals from succumbing to this temptation, each firm will be "motivated not to contribute to the joint effort, but to free-ride on the efforts of others. If all participants choose to free-ride, the collective benefit will not be produced."[321]

Unless there is a way to identify those arbitrators or providers who fail to follow the due process standards embodied in the protocols, they will continue to enjoy the benefits that the protocols have produced. That behavior will continue until the point is reached when such free-riding eliminates the benefits altogether. Although such benefits are somewhat speculative and difficult to quantify, the protocols have nonetheless produced some benefits that have been enjoyed by arbitrators who shirk the due process standards of the protocols.

The most obvious benefit may be that the protocols have helped to clothe the practice of mandatory arbitration for statutory disputes in legitimacy. It is difficult to object to or criticize the use of arbitration in this instance when the *Employment Protocol*, for instance, states that it embodies "standards of exemplary due process" in the conduct of such arbitration.[322] In addition, the existence of the protocols may have diminished the urgency for congressional intervention. Knowing that persons subject to arbitration are getting a "fundamentally fair hearing"[323] pursuant to the protocols may be the reason that, for the last decade, Congress has been unable to pass any legislation relating to the use of arbitration for statutory disputes and the processes that should be followed once that arbitration occurs.

Scholars of self-regulation agree that in order to prevent such opportunistic behavior, the self-regulatory scheme must contain mechanisms for monitoring a firm's compliance with the scheme and some kind of sanctioning device to punish firms when they act opportunistically.[324] The protocols are absolutely deficient in this connection. None of the protocols contain any mechanisms for identifying persons who fail to follow the protocol, for monitoring compliance by those who have agreed to follow the protocol, and for sanctioning them when they have failed to fulfill their

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[321] OSTROM, *supra* note 282, at 6.

[322] *See Employment Protocol*, *supra* note 1, at 173.

[323] *See e.g.*, *Consumer Protocol*, *supra* note 2, at *Principle 1*; *Health Care Protocol*, *supra* note 2, at *Principle 1*.

[324] *See, e.g.*, IAN AYRES & JOHN BRAITHWAITE, RESPONSIVE REGULATION 103 (1992) ("[W]e argue that retaining public enforcement (detection and punishment) of privately promulgated standards is likely to be an important component in constituting genuine private self-enforcement"); Maitland, *supra* note 261, at 139 (need to give peak organization power of compulsion "to reflect the real world probability that some number of opportunistic firms will disregard code . . . . Some form of sovereign to enforce terms of the social contract then becomes indispensable").

obligations under the protocol. For these reasons, the protocols are not as effective as they could be and can be seriously undermined by the "free-riding" of non-compliant arbitrators.

3. *Monitoring Compliance and Enforcement of the Protocols*

The protocols do not contain any mechanisms designed to monitor a firm's compliance with their requirements. Neither arbitrators nor providers are required to self-monitor and report about their compliance, nor are they subjected to monitoring by a third-party or entity. Significantly, the protocols do not contain any mechanisms for the parties most impacted by a firm's failure to follow the protocol to complain that the protocol was not adhered to in a particular arbitration.[325] Although a firm may have agreed to follow the protocol, [326] it is impossible to ascertain whether the firm has in fact done so in individual cases. There is clearly a lack of transparency with respect to compliance with the protocols.

In the context of self-regulation, transparency can be divided into three broad categories: (i) "public announcement of the principles and practices that the industry presumptively accepts as a guide to appropriate conduct and also as a basis for evaluating and criticizing performance"; (ii) "development of an information system for collecting data on the progress of member companies in implementing the industry codes"; and (iii) "monitoring

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[325] Sternlight, *supra* note 281, at 842 n.81 ("Even when the organization's rules require compliance with a particular Due Process Protocol, a complainant has no clear remedy if the organization nonetheless agrees to administer a clause that fails to comply with a Protocol.").

Although "[m]ost of the more formal ADR provider organizations do provide for grievance committees or ethics committees . . . [t]here are as yet, however, no formal requirements that such organizations provide such procedures for enforcing even their own rules." Menkel-Meadow, *supra* note 185, at 970. For that reason, the drafters of the Provider Principles included such a provision. Principle VI Complaint and Grievance Mechanisms states:

> ADR Provider Organizations should provide mechanisms for addressing grievances about the Organization, and its administration or the neutral services offered, and should disclose the nature and availability of the mechanisms to the parties in a clear, accurate and understandable manner. Complaint and grievance mechanisms should also provide a fair and impartial process for the affected neutral or other individual against whom a grievance has been made.

Menkel-Meadow, *supra* note 185, at 996.

[326] Steps have been taken by firms to comply with the Protocols. For example, the AAA has assigned one person to review all agreements that name the AAA as the provider organization to ensure that the agreement is in compliance. Bingham & Sarraf, *supra* note 135, at 13.

performance."[327] Self-regulation through the creation and adoption of the protocols by the major providers has achieved transparency with respect to only the first category. Transparency must be achieved across all three categories in order for the protocols to be effective self-regulatory instruments.[328]

This lack of transparency is probably the most troubling aspect of the protocols and is a serious weakness, which is compounded by the fact that arbitration is a confidential process—making transparency even harder to achieve. Providers of arbitration services encourage the use of arbitration with the promise that due process protections will be followed. They have, either intentionally or not, been able to fend off more intrusive government regulation at the federal level.[329] Their adoption of the protocols has also helped preserve arbitration's golden image, at least in the judiciary's mind, where arbitration is still granted favored status. It is therefore imperative that their conformance to the protocols is monitored and made public.

The damaging effect of the lack of monitoring and enforcement devices to the efficacy of the protocols cannot be fully appreciated until arbitration's unique role in dispensing private justice is broadly examined and viewed in the context of the present regulatory environment in which arbitration exists. As will be shown below, the lack of accountability in the protocols is even more problematic because of the lack of other mechanisms that could hold arbitrators and providers accountable for their conduct.

a. *The Regulatory Environment*

The arbitration industry, including both the arbitrators and the entities that provide administrative services in connection with an arbitration, is virtually unregulated.[330] Unless arbitration occurs in connection with a court

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[327] Gunningham & Rees, *supra* note 299, at 383–84.

[328] Concern about transparency in the arbitration industry appears to be one of the factors that led to the enactment of legislation regulating certain aspects of the industry by the California state legislature. One supporter of the legislation indicated to a reporter that "part of the problem stems from the secrecy in which the industry operates." Livingston, *supra* note 308, at 1.

[329] The AAA very publicly denounced the efforts by the California legislature to regulate the industry. *See, e.g.*, William K. Slate II, *The Justice-at-a-Price Guys Take Aim at Arbitration*, L.A. TIMES, Aug. 13, 2002, at B13. That denouncement led to a call for a boycott of the AAA by the San Francisco Trial Lawyers Association. *See* Alexei Oreskovic, *S.F. Trial Lawyers Boycott Arbitration Association Over Statements*, THE RECORDER, Oct. 8, 2002, at 9.

[330] *See, e.g.*, Menkel-Meadow, *supra* note 185, at 964–65 ("[B]ut for the most part, the practice of arbitration . . . is unregulated and virtually anyone can 'hang out a

or state-sponsored program that has formal standards for arbitrators,[331] anyone can be an arbitrator; there is no formal qualifying examination, no licensing or educational requirements, and no requirement that the person offering arbitration services be trained in any way. There is also no requirement that an arbitrator follow any particular code of ethics. While the lack of such standards and requirements may be beneficial in some respects, particularly because it does not bar a person of the parties' choosing from serving as an arbitrator, it nevertheless means that the profession, especially in terms of competency and ethics, is largely unregulated.

Of course, those arbitrators serving through a provider organization may have to possess certain qualifications in order to be eligible to be on the provider's roster. They would also be obligated to follow the provider's rules with respect to the arbitration process, including the standards set forth in the protocols, and would have to comply with the provider's ethical code of conduct. Training could also be required in order to be eligible to arbitrate certain kinds of disputes, including employment disputes.[332] However, concern has been voiced that such providers do not effectively enforce their codes,[333] and even when they do so, nothing is done to prevent the offending arbitrator from practicing solo or with another provider organization.[334]

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shingle'"); Margaret L. Shaw & Elizabeth Plapinger, *ADR Provider Organizations Should Increase Transparency, Disclosure*, DISP. RESOL. MAG., Spring 2001, at 14 (noting that ADR provider organizations are "largely unregulated entities").

[331] *See generally* Menkel-Meadow, *supra* note 185, at 955 (discussing court sponsored ADR).

[332] *See, e.g.*, *Employment Protocol*, *supra* note 1, at 174–75.

[333] *See, e.g.*, Cameron L. Sabin, Note, *The Adjudicatory Boat Without a Keel: Private Arbitration and the Need for Public Oversight of Arbitrators*, 87 IOWA L. REV. 1337, 1354 (2002) ("The first and most fundamental reason that codes of ethics are ineffective is that enforcement of ethics codes is discretionary and the arbitration industry is reluctant to enforce its codes."). *Cf.* Cliff Palefsy, *Only a Start: ADR Provider Ethics Principles Don't Go Far Enough*, DISP. RESOL. MAG., Spring 2001, at 18, 20 ("Self-regulation of the arbitration industry has been a dismal failure.").

[334] Even if a provider is willing to "delist" a member for failure to abide by its rules, such "delisting" will not necessarily stop the person from arbitrating:

> An association's enforcement powers extend only to its own members. Consequently, even if arbitration associations strictly enforce their codes by expelling arbitrators for misconduct, nothing prevents expelled arbitrators from practicing for another association or on their own; and because arbitration associations do not provide public listings of sanctioned or expelled arbitrators, other associations and the public have no means to identify and avoid unethical arbitrators. Because these associations are private, moreover, there is no way to insure consistent enforcement.

Sabin, *supra* note 333, at 1355.

i. *The Regulatory Impact of Federal and State Law*

The federal government has not completely abdicated its role in regulating arbitration. For example, securities arbitration, which is handled by the self-regulatory organizations formed pursuant to the Securities Exchange Act of 1934, is subject to oversight by the Securities and Exchange Commission (SEC).[335] Dispute resolution mechanisms used in connection with certain disputes regarding consumer products and warranties are also regulated.[336]

In addition, the FAA itself provides a mechanism for a party to challenge an arbitration award if the party believes "there was evident partiality or corruption in the arbitrators" or where the arbitrators engaged in misconduct by "refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or any other misbehavior by which the rights of any party have been prejudiced."[337] The FAA, however, is not deemed to be an effective tool for policing arbitrator misconduct for several reasons.[338] Arbitrators do not usually provide written opinions setting forth the reasons for their award,[339] and the

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[335] *See, e.g.*, Margaret M. Harding, *The Cause and Effect of the Eligibility Rule in Securities Arbitration: The Further Aggravation of Unequal Bargaining Power*, 46 DEPAUL L. REV. 109, 121 (1996) (discussing the role played by the SEC and the self-regulatory organizations in connection with securities arbitration).

[336] *See generally* Magnuson-Moss Warranty Act, 16 C.F.R. § 703 (2003).

[337] 9 U.S.C. § 10 (2000). The court may also vacate an award "where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made. 9 U.S.C. § 10. A court also has the power to modify or correct an arbitrator's award. 9 U.S.C. § 11.

[338] *See* Sabin, *supra* note 333, at 1347–48.

[339] Stephen L. Hayford, *A New Paradigm for Commercial Arbitration: Rethinking the Relationship Between Reasoned Awards and the Judicial Standards for Vacatur*, 66 GEO. WASH. L. REV. 443, 444–45 (1998) (noting that in the commercial arbitration field, arbitrators "seldom articulate their reasons for decision in their written awards").

The protocols are unlikely to significantly change this practice. The *Employment Protocol* merely requires the arbitrator to "issue an opinion and award setting forth a summary of the issues, including the type(s) of dispute(s), the damages and/or other relief requested and awarded, a statement of any other issues resolved, and a statement regarding the disposition of any statutory claim." *Employment Protocol*, *supra* note 1, at 176–77. The *Consumer Protocol* requires that the arbitrator "provide a brief written explanation of the basis for the award," if a party timely requests it. *Consumer Protocol*, *supra* note 2, at *Principle 15*. Similarly, the *Health Care Protocol* requires the arbitrator to accompany an award by an opinion, if a party requests it. *Health Care Protocol*, *supra* note 2, at *Principle 9*. No standards are provided concerning the scope of the opinion. If a party is concerned about costs, it is unlikely that the party will undertake the additional cost of requesting the opinion, even in its briefest form.

lack of a reasoned opinion makes it extremely difficult to challenge the award in court.[340] The grounds listed in the FAA for vacatur are "interpreted in an 'extraordinarily narrow' fashion,"[341] precluding a court from reviewing the merits of the controversy.[342] Moreover, the remedy available under the FAA, vacatur, is "arguably an unsatisfactory remedy because the parties face the costs of reengaging in a second round of arbitration."[343]

Courts have attempted to alleviate the strictness of the FAA's grounds for vacatur. A few non-statutory grounds for vacating an arbitrator's award have been recognized by the courts.[344] The most commonly used ground, "manifest disregard of the law," has been adopted by most courts.[345] However, although courts recognize a small handful of non-statutory grounds for vacatur, it is nonetheless equally difficult to obtain vacatur on these grounds, due, once again, to the lack of a reasoned opinion by the arbitrator: "It is clear, that, to date, the absence of substantive reasoned awards revealing the manner in which arbitrators have decided the cases before them has been a major factor in effectively insulating challenged arbitration awards from vacatur on the basis on non-statutory grounds."[346]

While regulation of arbitration at the federal level is minimal at best, states, on the other hand, have made various attempts to regulate arbitration. State power to regulate arbitration, however, has been significantly limited by a line of Supreme Court cases that have found certain state laws related to arbitration preempted by the FAA.[347] States are powerless to prohibit the

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[340] Hayford, *supra* note 339, at 445 ("[W]hen arbitrators do not provide substantive written awards revealing their mode of decision, judicial vacation of the award is virtually precluded.").

[341] Sabin, *supra* note 333, at 1349 (quoting Antwine v. Prudential Bache Sec., Inc., 899 F.2d 410, 413 (5th Cir. 1990)).

[342] Hayford, *supra* note 339, at 452.

[343] Sabin, *supra* note 333, at 1349.

[344] Hayford, *supra* note 339, at 461. Among the non-statutory grounds recognized by courts for vacatur is when the award "(1) is in 'manifest disregard of the law'; (2) is in direct conflict with 'public policy'; (3) is 'arbitrary and capricious'; (4) is 'completely irrational'; or (5) 'fails to draw its essence' from the parties' underlying contract." *Id.* (citations omitted).

[345] *Id.* at 450–51. The manifest disregard of the law standard requires the party challenging the award to show that "[t]he error must have been obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator" and "that the arbitrator appreciate[d] the existence of a clearly governing legal principle but decide[d] to ignore or pay no attention to it." Merrill Lynch, Pierce, Fenner & Smith. v. Bobker, 808 F.2d 930, 933 (2d Cir. 1995).

[346] Hayford, *supra* note 339, at 464–65.

[347] Preemption occurs because the FAA represents substantive federal law and as such displaces any state law or policy that conflicts with the FAA. *See* Southland Corp. v.

enforceability of arbitration agreements and they cannot, consistent with the FAA, condition the enforceability of an arbitration provision on the satisfaction of terms that are not imposed upon contracts generally.[348] However, general state contract law, including traditional defenses to the enforceability of a contract, is not preempted by the FAA.[349] Parties have attempted to use these defenses, with mixed results, to invalidate, among other things, unconscionable arbitration agreements. The assertion of such defenses to the arbitration agreement may explain some of the increase in judicial intervention that has been noted by commentators.[350]

ii. *The Effect of Civil Liability in Regulating Arbitrator Conduct*

Not only are arbitrators and arbitration service providers unregulated, they are also immune from civil liability in connection with the services they perform. Arbitrators are private judges, retained by the parties, to render a decision concerning the conflict at issue. Arbitration service providers are retained to perform a variety of essential services to facilitate the arbitration. "They often play a critical part in designing the ADR process and fine-tuning the procedural rules that will apply."[351] In addition to their role in "[e]stablishing and maintaining a pool of neutrals who meet its requirements for listing,"[352] the provider may also make decisions regarding the "scheduling of some procedures, such as the timing of preliminary discussions among the parties or the scheduling and location of initial hearings . . . and assist in the neutral selection process by identifying prospective neutrals based on the criteria provided by the parties, and, in some cases, making the appointment."[353] Providers may also rule upon a

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Keating, 465 U.S. 1, 15 (1983) (noting that the FAA preempted state law that prohibited arbitration of claims brought pursuant to the Franchise Investment Law); *see also* Allied Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 281 (1995) (FAA preempted state law that prohibited pre-dispute arbitration clauses in consumer agreements); Perry v. Thomas, 482 U.S. 483, 492 (1987) (noting that the FAA preempted California law that prohibited arbitration of wage claims).

[348] Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 686–87 (1996) (noting that the FAA preempted state law that required that arbitration clause to be presented in underlined capital letters on the first page of the contract).

[349] *See* Perry v. Thomas, 482 U.S. 483, 492–93 n.9 (1987) (citation omitted).

[350] *See* Gary Young, *Courts Increase Intervention in Arbitrations*, N.L.J., March 3, 2003, at A15.

[351] Stipanowich, *supra* note 305, at 816.

[352] *Id.*

[353] *Id.*

challenge to an appointed arbitrator and may "'troubleshoot' problems which the neutrals cannot or will not address, including payment issues."[354]

Because arbitrators perform judicial functions, they are granted immunity by the courts for "arbitral acts" that occur within their jurisdiction.[355] Although such quasi-judicial immunity does not protect an arbitrator from liability for criminal acts or nonfeasance, such immunity makes it virtually impossible for an aggrieved party to hold an arbitrator responsible for damages caused by his or her "misconduct or error."[356]

Arbitration service providers also enjoy immunity. "The principle of arbitral immunity is well-established in the courts, along with a 'penumbra' of immunity for providers."[357] Accordingly, these associations also cannot be held accountable for their misconduct in connection with the provision of arbitration services.[358] Such immunity seems to extend to the provider's failure to ensure not only that its arbitrators follow its ethical code, but that the arbitrators and the providers adhere to the due process protocols. Accordingly, unlike most industries and professions, the arbitration industry cannot be held responsible for its acts of misfeasance. We currently have a "present legal structure that gives arbitrators complete autonomy over the dispute resolution process, yet requires virtually no accountability of them."[359] While such immunity is not unprecedented, it is certainly problematic, for a number of reasons, which are beyond the scope of this Article but which are discussed by other commentators.[360] Because differences exist between the role of the judiciary and the role of arbitrators in the dispute resolution landscape, the adoption of such immunity has been questioned, and has led to calls for reform.[361]

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[354] *Id.*

[355] *See* Mark A. Sponseller, Note, *Redefining Arbitral Immunity: A Proposed Qualified Immunity Statute for Arbitrators*, 44 HASTINGS L. J. 421, 428 (1993) (citing Dennis R. Nolan & Roger I. Abrams, *Arbitral Immunity*, 11 INDUS. REL. L. J. 228, 242 (1989)); *see also* Menkel-Meadow, *supra* note 185, at 963 ("Because arbitrators often enjoy a 'quasi-judicial immunity' for performing judicial-like services, their conduct is virtually never reviewed in a legally filed malpractice action.").

[356] Sabin, *supra* note 333, at 1350-53.

[357] Stipanowich, *supra* note 305, at 817; *see also* Sponseller, *supra* note 355, at 428 ("Arbitration associations, in turn, derive their immunity from the arbitrator.").

[358] Presumably the exceptions to an arbitrator's immunity, based on criminal acts or nonfeasance, would apply equally to the provider.

[359] Sabin, *supra* note 333, at 1345.

[360] *See generally id.*; *Sponseller*, *supra* note 355.

[361] *See, e.g.*, Sponseller, *supra* note 355, at 442–47 (suggesting that common law immunity for arbitrators be statutorily amended to grant arbitrators only qualified immunity); *see also* Stipanowich, *supra* note 305, at 817 (noting that arbitral immunity

iii. *The Limits of the "Market" to Regulate Arbitration*

As was detailed in Part II, arbitration, with due process protections, was deemed a satisfactory alternative to court adjudication for employment disputes not subject to a collective bargaining agreements partly because of the positive impact arbitration had on labor disputes. However, labor arbitration takes place in a significantly different environment than employment, consumer, and health care arbitration.[362] Because of the characteristics of labor arbitration, market forces can better regulate the practice of arbitration by weeding out incompetent or unethical arbitrators and providers. As will be shown below, the current environment in which employment, consumer and health care arbitrations take place makes it difficult for those same market forces to provide effective regulation of arbitration.[363]

At the outset, the agreement to arbitrate a dispute with an employer in the union context is the result of arms-length bargaining by parties of relatively equal bargaining power.[364] Employment, consumer, and health care arbitration, on the other hand, typically arises because of the existence of a non-negotiable term that is imposed upon the employee, consumer, and patient by the employer, merchant, and health care provider. Thus, arbitration clauses are contained in contracts of adhesion where the less powerful party cannot negotiate the existence or even the details of the clause. Such clauses,

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was debated during the efforts to revise the UAA). *Cf.* Sabin, *supra* note 333, at 1368–80 (proposed a licensing requirement for arbitrators to, in part, alleviate the impact on arbitral accountability caused by arbitral immunity).

[362] *See* Stephen J. Ware, *The Effects of* Gilmer: *Empirical and Other Approaches to the Study of Employment Arbitration*, 16 OHIO ST. J. ON DISP. RESOL. 735, 737–40 (2001) (discussing the difference between labor and employment arbitration).

[363] As one commentator has noted:

> The practice of mandatory arbitration has changed everything. Now arbitration providers need only one satisfied customer to get repeat business, and it is always the same customer: the large corporation. Providers routinely refer to these companies as their "clients" and direct most of their marketing activities toward them because of the ability of these companies to deliver significant volumes of cases through the imposition of adhesion contracts on consumers and employees. The ability of the parties and free market to regulate the neutrality and ethics of the providers has been eliminated.

Palefsky, *supra* note 333, at 19.

[364] *See, e.g.*, Getman, *supra* note 146, at 933 ("When labor arbitration has been successful, it is because collective bargaining has established a rough equality and mutual respect between the parties."); Gorman, *supra* note 14, at 649 ("The grievance and arbitration procedure in a collective bargaining agreement is a product of conscious choice, and often extensive and arms' length negotiation between both parties.").

presented on a take-it-or leave it basis, may even be "accepted" by the employer, consumer, or patient without his or her knowledge of its existence.[365] Accordingly, whatever regulation of the arbitration process that can occur during the negotiation of the arbitration clause itself is completely absent in most arbitrations subject to the protocols.

Labor arbitration is characterized by "two institutional repeat players"[366] who are generally represented by counsel.[367] As institutional repeat players, the parties are in a position to develop information about particular arbitrators.[368] That information gives the parties the ability to control the pool of acceptable arbitrators. If an arbitrator is found to be incompetent or unethical or if he or she fails to provide the parties the due process protections that labor arbitration promises, the parties, in future arbitrations, will decline to find that arbitrator acceptable for service. This would, presumably, drive the arbitrator out of the business of deciding labor disputes subject to the grievance arbitration process.

This "self-regulation of the arbitration system"[369] cannot take place when one of the parties to the arbitration is not a repeat player, but an incidental one, incapable of influencing the future employment of an acceptable arbitrator. Such one-shot players are also unable to develop an institutional memory about particular arbitrators, which greatly affects their ability to select an acceptable arbitrator to hear a particular dispute.[370]

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[365] Arbitration clauses have been found in, for example, an employee handbook, the "terms and conditions agreement" sent along with the delivery of a consumer product, and the "stuffer" material accompanying a merchant's bill. *See, e.g.*, Blair v. Scott Specialty Gases, 283 F.3d 595 (3d Cir. 2002) (employee handbook); Brower v. Gateway 2000, Inc., 246 A.D.2d 246 (N.Y. App. Div. 1998) (terms and conditions agreement); Ting v. A.T&T., 182 F. Supp. 2d. 902 (N.D. Cal. 2002), *aff'd in part, rev'd in part*, 319 F.3d 1126 (9th Cir.), *and petition for cert. filed*, 71 U.S.L.W. 3680 (U.S. April 16, 2003) (No. 02-1521) (stuffer material).

[366] Bingham & Sarraf, *supra* note 135, at 1.

[367] Getman, *supra* note 146, at 920 n.15.

[368] Bingham & Sarraf, *supra* note 135, at 1 ("Theory suggests repeat players will do better than one-shot players because of factors including the ability to use experience from one transaction to structure the next one, access to specialized legal counsel, bargaining reputation and credibility, and familiarity with neutrals and administrators.").

[369] *Id.* at 21.

[370] Lisa Bingham, *Emerging Due Process Concerns in Employment Arbitration: A Look at Actual Cases*, 47 LAB. L.J. 108, 119 (1996); *see also* Maltby, *supra* note 14, at 19–22 (discussing the difficulty of duplicating for a one-shot employee the institutional memory possessed by a repeat player so that the employee has information concerning a proposed arbitrator's impartiality); Gorman, *supra* note 14, at 656 (noting that the concern that an arbitrator will favor the repeat player in an arbitration is absent in

The regulatory function the written opinion plays in grievance arbitration is also absent in non-union arbitration. Labor arbitrators "normally write opinions, albeit usually rather brief ones, that set forth findings about important disputed facts and conclusions about the interpretation and application of the labor agreement."[371] Requiring an arbitrator to explain his or her award clearly influences an arbitrator's decisionmaking process; it is much more difficult to be blatantly biased, unfair, or arbitrary when called upon to explain yourself. Moreover, those labor decisions can be published and thereby subject to scrutiny by, among others, the institutional players and their representatives.

As previously discussed, the protocols do not require an arbitrator to provide an explanation of his or her award, unless specifically requested to do so by one of the parties. Even if a reasoned opinion is obtained from the arbitrator, it may remain private between the parties to the dispute. The market cannot work to rid the arbitrator pool of unacceptable arbitrators when the market lacks information as to the arbitrator's decisionmaking processes.

Thus, the market, while possibly effective in regulating grievance arbitration that takes place pursuant to a collective bargaining agreement, cannot be counted on to be effective in regulating arbitration as it is occurring today involving non-union employees, consumers, and patients.[372] Those players generally have no real and meaningful choice but to arbitrate the dispute and no choice in the selection of the arbitration service provider, which, as described earlier, plays a critical role in the dispute resolution process. In addition, because those players are not repeat players, they lack information that hinders both their selection of arbitrators and their role in influencing the future employment of an arbitrator. Because the market cannot play its usual role in regulating conduct, monitoring and sanctioning mechanisms are particularly critical to the usefulness of the protocols in regulating the arbitration process.

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grievance arbitration where an institutional memory is developed because of the union's participation on behalf of the employee).

371 Gorman, *supra* note 14, at 666.

372 *Cf.* Menkel-Meadow, *supra* note 185, at 950–51 ("While some claim that the market will sufficiently discipline a process in which arbitrators must be agreed to by the parties, I believe it essential that some forms of transparency, disclosure, rules, sanctions, and consequences will be necessary for arbitration to maintain any semblance of legal legitimacy and justice.") (citations omitted).

iv. *The Limits of Professional Associations to Regulate Arbitration*

Professional associations can serve a regulatory function.[373] By creating "codes of conduct" and "best practices," members in the association will know what is expected of them in order to be in good standing. In addition, professional associations can limit membership in the association to those who meet certain qualifications. The threat that the association will enforce its rules against its members can greatly influence the conduct of the members.

The arbitration industry has a number of professional associations arbitrators can join, and those associations, although not required to do so, have adopted ethical codes that members are expected to follow.[374] However, arbitrators are not required to join a professional association; membership is not compulsory in the arbitration industry. In addition, as mentioned earlier, professional associations are reluctant to sanction members who fail to follow their privately promulgated standards of conduct.[375] Accordingly, any regulatory impact that an arbitration professional association can have on the conduct of its members is severely limited by its reluctance to compel its members to abide by its rules. Self-regulation by voluntary professional associations that are not required by law to sanction members for noncompliance with their codes of conduct cannot be counted on to be an effective regulatory tool.[376]

b. *Suggested Mechanisms to Make Protocols More Effective*

Given the current regulatory environment, it is apparent that monitoring compliance with the protocols and sanctioning arbitrators and providers who fail to comply with the protocols is essential to make them effective. There

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[373] Ayres & Braithwite, *supra* note 324, at 39 ("In some respects, industry associations can be more important regulatory players than single firms.").

[374] For example, the NAA has developed a Code of Professional Responsibility that is applicable to its members. The Code explicitly states that "[t]he National Academy of Arbitrators will expect its members to be governed in their professional conduct by this Code." National Academy of Arbitrators Code of Professional Conduct, Application of Code, *available at* http://www.naarb.org/code.html (last visited Oct. 2, 2003).

[375] *See supra* notes 332–33 and accompanying text. The arbitration industry is not alone in its reluctance to sanction its members. *See* Gunningham, *supra* note 9, at 69 (discussing fact that trade groups never terminate membership for failure to follow the group's code of conduct).

[376] *See* Karmel, *supra* note 284, at 1312 (compulsory membership in professional association and power to discipline necessary for effective self-regulatory scheme).

are a number of different ways that such monitoring and enforcement can be achieved, which will be discussed below. However, before any monitoring can take place, standards need to be drafted that address the question of what the monitoring system should measure.[377] At a minimum, the system should measure the arbitrator's and the provider's actual compliance with the protocol in each case handled and the processes they have engaged in to ensure such compliance.

i. *Self-Monitoring and Self-Reporting*

One option that can be used is self-monitoring and self-reporting. Such reporting should be standardized and made public so that comparisons can be made among arbitrators and providers.[378] This option has the benefit of being less costly than other options that will be considered, and it provides some transparency so that the "market" can presumably work to provide some regulation.[379] However, self-reporting without explicit sanctions has been used in other industries and is generally not considered effective.[380] In addition, if the only "enforcement" of the standards comes from the market itself or through "informal means of coercion, the transferal of norms, and diffusion of best practices," [381] it is unlikely to be effective.

External monitors and enforcers are generally deemed to be more effective in policing a self-regulatory scheme. There are at least two possibilities when external monitors are used: a government entity, or a third-party group which would act as "surrogate regulators; monitoring or policing the code as a complement or alternative to government involvement." [382] Of course, a combination of these two options can be used as well.

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[377] *See* Gunningham, *supra* note 9, at 71.

[378] *Id.*

[379] The market could work in a number of ways. The parties who use arbitration service providers, assuming they have a choice, can decline to retain a provider if that provider's record with respect to compliance is not satisfactory. Provider organizations may expel an arbitrator from the pool of available arbitrators if that arbitrator has an unsatisfactory record. In addition, professional associations may also decline membership to those who fail to comply with the protocols.

[380] *See* Gunningham, *supra* note 9, at 69–70 (noting that "self-monitoring and self-reporting" are significant problems that negatively impact on the effectiveness of the self-regulatory effort in the chemical industry); *see also*, OSTROM, *supra* note 282, at 45.

[381] King & Lennox, *supra* note 283, at 698 (citation omitted).

[382] Gunningham & Rees, *supra* note 299, at 402–03.

ii. *Monitoring and Enforcement by the Government*

Government involvement can take a number of forms. At a minimum, government involvement is needed to make those arbitrators who are not otherwise bound to follow the protocols (because they do not work through a provider organization or belong to a professional association) comply with the protocols.[383] Accordingly, some kind of legislation is needed requiring those who serve as arbitrators and who provide related administrative services to follow the protocols.

In addition, a government agency can also provide oversight and enforcement of the industries' compliance with its own privately promulgated standards, thereby creating a co-regulatory scheme.[384] Oversight should involve external verification and audits of those providing arbitration services.

The government agency must also have the power to sanction those who do not comply with the protocols. Firms and individuals that choose to breach the self-regulatory scheme may do so because it will "generate a higher immediate return . . . than will [complying with the rule] unless [the breach] is detected and a sanction . . . is imposed that makes [it more costly to breach]."[385] With respect to identifying the appropriate kind of sanction that will make noncompliance more costly than compliance, the literature suggests that graduated sanctions be used.[386] If there is only one enforcement tool and it is a significant one, enforcers may be unwilling to use it.[387] Accordingly, an enforcement pyramid can be developed where the sanction increases if the uncooperative behavior persists.[388] If the industry knows that the enforcers are willing to sanction, individual members may be deterred

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[383] *Id.* at 394 (explaining that "self-regulation can only work if the government intervenes directly to curb the activities of non-participants if members of an industry refuse to commit").

[384] "[E]ffective co-regulation must involve a willingness on the part of government to take tough measures if industry betrays the trust that has been placed in it to regulate itself." Gunningham, *supra* note 9, at 90.

[385] OSTROM, *supra* note 282, at 44.

[386] *See id.* at 186; AYRES & BRAITHWAITE, *supra* note 324, at 35.

[387] *Id.* at 36.

[388] *See id.* at 35, 39. In order to possess effective enforcement mechanisms, other changes may need to be implemented in the arbitration industry. Requiring arbitrators and providers to obtain licenses to provide arbitration and administrative services could provide an effective enforcement tool. While a first time failure to follow the protocols should not result in revocation of the license, repeated failure could result in either the suspension or revocation of the license. For a compelling argument for licensing of arbitrators see Sabin, *supra* note 333, at 1370–71.

from acting opportunistically. The collective benefit the industry hopes to attain through the use of self-regulation may then be realized. A self-regulatory scheme, "underpinned by some form of state intervention" is deemed "more resilient and effective than self-regulation in isolation."[389]

Government oversight of an arbitration program is not unprecedented. In the securities industry, customers and employees of broker-dealers are frequently compelled to arbitrate the claims they have against the broker-dealer.[390] Those arbitrations take place pursuant to the arbitration program developed by one of the self-regulatory organizations (SROs).[391] The arbitration rules of the SRO, while privately promulgated, must be approved by the SEC. In addition, the SEC has the power to require a SRO to adopt rules with respect to the conduct of arbitrations.[392]

Government involvement can also be more than disciplinary.[393] The government may become involved in standard-setting.[394] In that regard, the government can, with the input of the arbitration industry and the public, make changes to the due process standards set forth in the protocols to deal with changes occurring in the practice of arbitration and in the use of pre-dispute arbitration clauses. Such changes could enhance the protocols' ability to provide employees, consumers, and patients with a fair and effective process of dispute resolution. Some of the areas ripe for change are detailed later.[395]

Government regulation is not without its problems however. Numerous concerns have been voiced about the limits of government regulation. It is considered to be expensive and inflexible. It is criticized as "intrusive or inefficient, and . . . frequently . . . subverted."[396] Moreover, government regulation is considered to be limited in its ability to impact on the ethical

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[389] Gunningham & Reese, *supra* note 299, at 366.

[390] *See, e.g.*, Securities Arbitration—How Investors Fare, G.A.O. Pub. GGD-92-74, (May 11, 1992) (finding that arbitration is the most frequently used method of resolving securities disputes).

[391] SRO is defined as "any national securities exchange, registered securities association, or registered clearing agency, or . . . the Municipal Securities Rulemaking Board." Securities Exchange Act of 1934 § 3(26), 15 U.S.C. § 78c(a)(26) (2000).

[392] The Securities Exchange Act empowers the SEC to amend the rules of the SROs. Securities Exchange Act of 1934 § 19(c), 15 U.S.C. § 78s(c) (2000).

[393] *See* Karmel, *supra* note 284, at 1300 (noting that government regulation, like self-regulation, can be disciplinary).

[394] *Id.*

[395] *See infra* note 457–64 and accompanying text.

[396] King & Lennox, *supra* note 283, at 698 (citations omitted).

behavior of those it regulates.[397] In addition, because "government can operate only by proscription, . . . large areas of conduct and activity too minute for satisfactory control," are left unregulated.[398] Concerns have also been voiced that government regulation can be too easily captured or co-opted by interest groups.[399] Finally, government regulation is limited because "the state simply cannot afford to do an adequate job on its own."[400] Such limitations counsel against the exclusive use of the government to regulate the process of arbitration.

iii. *Monitoring and Enforcement by Third-Party "Surrogate Regulators"*[401]

Because of the limits of government regulation by itself, or in tandem with a self-regulatory scheme, a preferable model to make the protocols more effective would be the creation of a group that would be responsible for monitoring compliance[402] with each protocol and for enforcing such compliance by the imposition of graduated sanctions.[403] For purposes of this Article, such groups will be called "oversight groups."

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[397] Karmel, *supra* note 284, at 1304 ("Self-regulation, rather than governmental regulation, generally has been considered better able to address ethical, as opposed to legal, conduct"); *see also* Gunningham, *supra* note 9, at 58 ("Moreover, because self-regulation contemplates ethical standards of conduct which extend beyond the letter of the law, it may significantly raise standards of behavior.").

[398] Karmel, *supra* note 284, at 1304 (citing Justice Douglas when he was Chairman of the SEC).

[399] *Cf.* Gunningham, *supra* note 9, at 90 (noting that regulatory process in co-regulatory scheme can become co-opted by business).

[400] AYRES & BRAITHWAITE, *supra* note 324, at 103.

[401] *See* Gunningham & Rees, *supra* note 299, at 402–03.

[402] Monitoring can be accomplished in a number of ways. It can include a requirement that the arbitrator or provider report on its compliance with the protocols. Audits by the group can be conducted to verify such reports. Monitoring can also be accomplished by requesting specific information regarding the arbitration process from the actual users of arbitration services. Rules will have to be drafted by the group to preserve the confidentiality of the information obtained.

[403] Maitland calls this group a "peak organization" and describes it as follows:

> Peak (or "encompassing") organizations are not merely larger special interest organizations. By virtue of the breadth and heterogeneity of their membership, they are transformed into a qualitatively different phenomenon. Indeed, peak organizations are likely to exert pressure on the behavior of their members in the direction of the public interest.

Maitland, *supra* note 261, at 139.

Ideally, these groups should be composed of a variety of individuals and entities who have an interest and a stake in the arbitration of employment, consumer, and health care disputes. These groups, at a minimum, should include representatives from the groups of persons most affected by the pre-dispute arbitration clause: employees, consumers, and patients. The groups should also include representatives of the arbitration industry and those who draft their agreements with pre-dispute arbitration clauses: employers, merchants, and health care providers. The more inclusive the organization is, the more likely it will "resist efforts by part of its membership to obtain private benefits at the expense of other parts."[404] Use of such an oversight group will result in a model where the users of the common resource "play a major role in monitoring each others' activities."[405] Self-regulatory schemes designed in this manner have, in other contexts, been successful.[406] Because such oversight groups are necessary to the effectiveness of the arbitration industry's self-regulating effort, the industry itself should be responsible for facilitating the creation of such groups and financing their activities.

A model already exists for creation of such oversight groups. As was detailed earlier, the Task Force, the National Consumer Disputes Advisory Committee, and the Commission on Health Care Dispute Resolution, which developed the *Employment*, *Consumer* and *Health Care Protocols*, respectively, were composed of a variety of persons interested in the use of arbitration as a dispute resolution process.[407] While these groups included representatives with a wide range of interests, "major demographic stakeholders"[408] must be included in the membership of each group in order for the group to have any legitimacy.[409]

I suggest that three different groups be created to oversee compliance and enforcement with each of the three protocols because significant differences exist in the practice of arbitration in each area, in the identity of individuals or entities who have an interest in such arbitration, and in the provisions of each protocol that warrants separate oversight of each protocol.

[404] *Id.* at 139–40.

[405] OSTROM, *supra* note 282, at 59.

[406] *See id.* at 58–102.

[407] *See supra* notes 120–22, 202–03, 218 and accompanying text.

[408] *See infra* text accompanying notes 431–34 (discussing concern that group responsible for draft of *Employment Protocol* did not contain all "major demographic stakeholders").

[409] One of the challenges that will have to be faced in connection with the creation of such oversight groups is that some stakeholders may refuse to be associated with the arbitration industry in any capacity. If that is the case, and major stakeholders cannot be represented in the oversight group, the group will not succeed and public enforcement by the government of the private standards embodied in the protocols will be the only viable alternative to the current scheme of self-policing.

In order for this model to work, the group has to be given the power of compulsion.[410] The arbitration industry must agree to be monitored by the oversight group and to abide by the sanctions the group imposes for any breach of the protocols found through such monitoring. It is more likely, under this scheme, that the industry will, in fact, cooperate. Through its representatives, the industry will have a voice in how that monitoring should be conducted and what the sanctions should be for noncompliance. "Mutual coercion, mutually agreed upon" is considered the "classic solution to the collective action problem . . . ."[411]

The existence of oversight groups, which have the power to monitor and enforce the protocols, can benefit those impacted by mandatory arbitration in other ways. For example, the groups can also play a role in standard setting. The groups' work will give them a bird's eye view as to the sufficiency of the actual standards of the protocols to provide due process protections to those compelled to arbitrate. They can suggest changes to the protocols based on issues they have found in practice, or based on changes occurring in arbitration law, or in the contractual arbitration provisions. The groups can also monitor and oversee other aspects of the services that the providers supply. They can monitor the providers' roster to ensure that those on it represent, as promised by the providers, a diverse group of arbitrators; they can monitor the training programs required by the provider to ensure that the arbitrators made available to the parties are competent and well-trained. They can determine whether party complaints to the provider organization about, among other things, an arbitrator's conflict of interest, were adequately addressed by the provider.

The oversight groups may also exert pressure on those arbitrators who have not committed to abide by the protocols to publicly announce their intention to follow the protocols. Each group can maintain a database identifying those arbitrators who have agreed to be bound by the protocols, detailing any complaints made against an arbitrator for failing to follow the due process protocols, along with information regarding the resolution by the oversight group of such complaints. A recalcitrant arbitrator, knowing that a potential user can "check" his or her commitment and record of compliance with an oversight group, may be persuaded to comply with the protocol.

The willingness of the industry to abide by the protocols and to be monitored provides the public with the transparency that is missing in the current scheme. Such transparency is needed not only to deal effectively with the free-rider issue, but also to ensure that the reasonable expectations of the parties, and of society as a whole, are being met by the arbitration process.

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[410] *See* Maitland, *supra* note 261, at 139.

[411] Gunningham, *supra* note 9, at 81 (quotations omitted).

Such transparency will also likely lead the public to form a favorable impression of the arbitration industry's commitment to due process. By agreeing to be monitored, the industry can shed its image of secretiveness.

Use of an oversight group that has the power to compel compliance with the privately promulgated standards embodied in the protocols, is unprecedented in the arbitration industry[412] and will, no doubt, be a tough sell.[413] In a self-regulatory scheme, "[s]ubstantial benefits have to be obtained to make costly monitoring and sanctioning activities worthwhile."[414] Monitoring and sanctioning of the arbitration industry clearly provides significant benefits to the industry that outweigh the costs associated with such activities. It may be the one way for the industry to head off more intrusive (and maybe more burdensome and inefficient) government regulation at either the federal or state level.[415] In the same vein, it may help the industry maintain the immunity it enjoys from civil lawsuits.[416] It may also be the only way for the industry to realize some of the theoretical benefits of self-regulation: "Because standard setting and identification of breaches are the responsibility of practioners with detailed knowledge of the

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[412] The securities industry established a task force to develop a uniform code of arbitration procedure that would apply in all SRO arbitrations. That task force, named the Securities Industry Conference on Arbitration (SICA), was composed of members of the SROs, the Securities Industry Association and the public. *See* Securities Industry Conference on Arbitration, Second Report of the Securities Industry Conference on Arbitration to the Securities and Exchange Commission, Proposal for a Uniform Code of Arbitration 2 (Dec. 28, 1978). SICA developed, among other things, uniform rules, that were adopted by the SROs and approved by the SEC. *See* Harding, *supra* note 335, at 123.

Since the creation of the uniform code, SICA has continued to play an active role. It "monitors the actual performance of the [Uniform] Code, and further fine-tune[s] and adjust[s] its provisions, as the need arises." Constantine N. Katsoris, *The Resolution of Securities Disputes*, 6 FORDHAM J. CORP. & FIN. L. 307, 317 (2001). Although SICA plays an overall "watchdog" role, it lacks the power to compel compliance with the uniform rules. *See* Constantine N. Katsoris, *Should* McMahon *Be Revisited?* 59 BROOK. L. REV. 1113, 1152 (1993) (analogizing SICA to the "cop on the beat"). That lack of power, however, is arguably not as significant as it is with respect to the arbitration industry's compliance with the protocols because the SEC itself has the power to compel the SROs to comply with the arbitration rules.

[413] *See* Maitland, *supra* note 261, at 143–45 (discussing the barriers to "business self-regulation by a peak organization taking root in the U.S.").

[414] OSTROM, *supra* note 282, at 36.

[415] *See supra* note 328 (discussing recent legislation in California aimed at regulating the arbitration industry).

[416] *See supra* notes 355–61 and accompanying text discussing arbitral immunity.

industry, this will arguably lead to more practicable standards, more effectively policed."[417]

The industry's agreement to be monitored may also be the only way arbitration as a dispute resolution process can maintain its favored status, and as mentioned, may help improve the public's view of arbitration by providing much needed transparency. That alone may be worth the cost of monitoring and enforcement. If the public is favorably impressed with arbitration, fewer challenges to arbitration agreements may occur, and more individuals may be inclined to agree, either pre-dispute or post-dispute to arbitration as a dispute resolution process.

The lack of monitoring and enforcement mechanisms in the protocols is a serious weakness that impacts the arbitration industry's commitment to the protocols and its ability to prevent free-riding. Such weakness in the protocols is particularly damaging considering that there are so few restraints on the industry as a whole. In order to be an effective self-regulatory scheme, the industry must abandon this current model, and adopt a model that gives power to an external entity to monitor and enforce the protocols. If the industry is unwilling to give that power to an oversight group, the government must step in to provide the much needed oversight.

c. *Substantive Adequacy of the Standards*

No matter how many credible commitments are obtained or how well the firms in the industry are monitored and sanctioned, the effort to regulate arbitration will only be successful if the standards that are set to govern the collective action are deemed substantively adequate. A legitimate concern is raised when an industry sets the standards by which it will be judged.[418] Some believe that those standards will be produced by taking into account the interests of the industry only and not the interests of the public. Once those standards are set, the industry will be able to avoid direct government regulation that would be more responsive to the public's interest:

> [S]elf-regulation has an extremely tarnished image, and is often reviled by conservationists, consumer organizations and other public interest groups for being a charade—a cynical attempt by interested parties to give the appearance of regulation (thereby warding off more direct and effective government intervention) while serving private interests at the expense of the public .... "Self-regulation is frequently an attempt to deceive the public into believing in the responsibility of a[n] irresponsible industry.

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[417] OSTROM, *supra* note 282, at 58.

[418] *See* Gunningham, *supra* note 9, at 68 (discussing the "credibility obstacle" caused by "regulation of the industry, by the industry, for the industry").

> Sometimes it is a strategy to give the government an excuse for not doing its job."[419]

However, the protocols are not a typical industry self-regulatory scheme. In industry self-regulation, members of an industry set the rules and standards "relating to the conduct of firms in the industry."[420] In addition to the presence of the arbitration industry, groups outside of the arbitration industry were also present and took part in the drafting of each of the protocols.[421]

The presence of "outsiders" in the drafting of the protocols make the self-regulatory effort more like business self-regulation than industry self-regulation.[422] Accordingly, while the protocols primarily regulate the conduct of arbitrators and arbitration service providers, they also seek, both directly and indirectly, to regulate the conduct of those businesses and

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[419] Gunningham & Rees, *supra* note 299, at 366, 370 (citing John Braithwaite, *Responsive Regulation in Australia, in* REGULATION AND AUSTRALIA'S FUTURE 91 (P. Grabosky and J. Braithwaite eds., 1993)).

[420] *Id.* at 364–65.

[421] As mentioned, the Task Force which produced the *Employment Protocol* consisted of representatives from a variety of organizations including the AAA, ABA, NELA and the ACLU. *See Employment Protocol*, *supra* note 1, at 178.

The National Consumer Disputes Advisory Committee which produced the *Consumer Protocol* was composed of representatives with a variety of backgrounds and from a variety of organizations. Not only was the AAA represented but so were persons from organizations that represent the interests of consumers, including the Consumer Frauds and Protection Bureau of the New York State Attorney General's office and the Bureau of Consumer Protection of the Federal Trade Commission. In addition, persons with experience representing the providers of goods and services were also present, including former counsels to AT&T and General Motors Corp. *See Consumer Protocol*, *supra* note 2, at *List of Signatories*. The reporter for the *Consumer Protocol* found that the advisory committee, responsible for drafting the protocol, "came to the table with many different viewpoints." Stipanowich, *supra* note 305, at 821. He described the committee as follows:

> The group included, among others, consumer advocates with various reservations about contractually mandated participation in ADR, corporate attorneys with considerable experience in the drafting of consumer contracts, and agency representatives with a regulator's perspective. The diversity of the group was mirrored by its leadership: the co-chairs were a well-known former California appellate judge and counsel for leading financial institutions and the director of the ADR Unit of the Virginia Consumer Protection Division.

Id.

The Commission on Health Care Dispute Resolution, which was responsible for producing the *Health Care Protocol*, was co-chaired by members of the ABA, AAA and the AMA. *See supra* note 2.

[422] Maitland, *supra* note 261, at 137.

entities that include arbitration clauses in agreements dealing with employees, consumers, providers, and purchasers of health care services.

For example, direct regulation of the conduct of a provider of goods and services can be found in the *Consumer Protocol.* In Principle 2, the protocol directs such providers to give consumers certain information regarding the alternative dispute resolution program.[423] In a health care dispute, if a plan mandates mediation, the *Health Care Protocol* states that the health plan should pay the costs of such mediation.[424]

Indirect regulation is apparent in all of the protocols but probably most apparent in the *Employment Protocol.* There, arbitrators are instructed to reject cases "if they believe the procedure lacks requisite due process."[425] The possibility of such rejection may temper the conduct of those who would use the arbitration process to gain unfair advantage and lead them to follow the procedures set forth in the protocol. That, of course, is the hope of the creators of the protocol—those who insist on arbitration will also voluntarily agree to follow and be bound by the protocol. If they do not voluntarily agree, such users of arbitration will be unable to find arbitrators or provider organizations (because all have voluntarily agreed to insist that the protocol be followed in all arbitrations) to hear and administer their cases. This kind of business coordination is precisely one of the benefits of self-regulation on a business-wide basis.

Self-regulation on a business-wide basis, encompassing diverse interests, is an attractive alternative to industry self-regulation because the code of conduct it adopts, while maybe not "superior" to the code the industry itself may adopt, is superior insofar as it is a "common" code that "enables firms to coordinate their behavior."[426] A code produced by the diverse interest group, a "peak confederation or peak organization"[427] even if only "morally binding," may have greater success in influencing the conduct of individual players in the industry because it embodies "good practice" and "serve[s] as

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[423] *Principle 2* provides in relevant part:

> Providers of goods or services should undertake reasonable measures to provide Consumers with full and accurate information regarding Consumer ADR Programs. At the time the Consumer contracts for goods or services such measures should include (1) clear and adequate notice regarding the ADR provisions, including a statement indicating whether participation in the ADR Program is mandatory or optional, and (2) reasonable means by which Consumers may obtain additional information regarding the ADR Program.

Consumer Protocol, supra note 2, at *Principle* 2.

[424] *Health Care Protocol, supra* note 221, at *Principle* 10.

[425] *Employment Protocol, supra* note 1, at 175.

[426] Maitland, *supra* note 261, at 138.

[427] *Id.* at 137.

a standard against which corporate behavior could be judged in individual cases." [428]

By including persons knowledgeable of the interests of employees, consumers and health care participants in the drafting process of the protocols, the protocols have avoided, to some extent, the credibility problem that generally plagues industry self-regulation. "[S]elf-regulation seems to exist in a legal and political vacuum, striving for a legitimacy that it may never fully attain."[429] Because of the diversity of the memberships of the groups that drafted the protocols, it is much more difficult to make the claim that the drafting groups "align[ed] [themselves] with the sectional interests of particular firms or industries,"[430] and drafted standards that benefited the industry only. However, at least one commentator has raised a concern about the diversity of the task force involved in the drafting of the *Employment Protocol*:

> [A] glaringly apparent problem exists in the development of the ADR Protocols. There was an obvious lack of participation of representatives from many of the very classes of individuals the civil rights statutes were erected to protect . . . . [I]t is inappropriate to fail to appreciate the tragic impact of the de facto exclusion or denial of participation of trained and qualified racial and ethnic minorities, women, and disabled voices in the development of the protocols. This group of individuals are some of the major shareholders in the process.[431]

While Professor Green does not argue that the actual drafters of the *Employment Protocol* "were incapable of or did not intend to develop a protocol which seeks to be fair and regular in addressing the rights and interests of various affected individuals,"[432] she nonetheless makes the salient point that inclusion of the "major demographic stakeholders" would have provided the drafters with a "different perspective" which may have led to the adoption of different standards.[433] Green discusses a number of

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[428] *Id.* at 138.

[429] Karmel, *supra* note 284, at 1299.

[430] Maitland, *supra* note 261, at 137.

[431] Green, *supra* note 55, at 215.

[432] *Id.* at 215 n.286.

[433] *Id.* Professor Green stated her understanding of the membership of the task force:

> As far as the author understands, of the twelve representatives who participated in the development of the ADR Protocol, none were members of a racial or ethnic minority or disabled. Nor were there any participants whose main purpose was to represent the interests of these groups. Only one was a woman, and there was no indication from the information provided that she represented a group dedicated to

standards that may have been different. Among others, she focuses on the protocol's "waffling" on the issue of the acceptability of pre-dispute arbitration clause. Professor Green also notes that the provisions regarding arbitral costs may be inadequate.[434] Many claimants with statutory employment claims, she notes, are likely to be members of disadvantaged socio-economic groups, and the least likely to be able to afford the costs of arbitration. Because employers receive financial benefits from arbitration, Professor Green asserts that the costs and fees of arbitration "should be borne by the employer."[435] The composition of the roster of arbitrators called for in the *Employment Protocol* is also deemed inadequate by Professor Green because, although it provides for a roster of arbitrators and mediators who are "diverse by gender, ethnicity, background, experience, etc.,"[436] it does not include racial minorities.[437]

Although the task force may not have been as diverse as it ideally could have been, it is not claimed that it was controlled by the arbitration service industry. Nevertheless, "the more inclusive or encompassing the organization, the larger the fraction of society it represents, and so the higher the probability that it will oppose self-serving behavior (by sections of its membership) that inflicts external costs on the rest of society."[438]

Other deficiencies have been noted by other commentators. For example, after reviewing the *Employment Protocol*, Professor Stone concluded that "it presents at best a bare minimum" of due process standards.[439] She found that it provides employees with "few, if any, significant process rights."[440] She takes issue with its lack of guidance for ensuring arbitrator impartiality. She

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women's issues. There were also no representatives of employees in lower socio-economic groups or of the aging workforce, specifically.

Id. at 215 n.285.

[434] *See supra* text accompanying note 179 (discussing the *Employment Protocol*'s provision regarding costs).

[435] Green, *supra* note 55, at 219. As will be recalled, this is precisely the rule adopted by the *Cole* court. *See supra* notes 234–37 and accompanying text.

[436] *Employment Protocol*, *supra* note 1, at 174.

[437] Green, *supra* note 55, at 215.

[438] Maitland, *supra* note 261, at 140. As Professor Maitland observes:

> Peak (or "encompassing") organizations are not merely larger special interests organizations. By virtue of the breadth and heterogeneity of their membership, they are transformed into a qualitatively different phenomenon. Indeed, peak organizations are likely to exert pressure on the behavior of their members in the direction of the public interest.

Id. at 139.

[439] Stone, *supra* note 54, at 1045.

[440] *Id.*

notes the ambiguous treatment of arbitral expense[441] and she found the provisions regarding the competency of the arbitrator to be "extremely weak."[442] Lack of guidance regarding "what constitutes a knowing agreement to arbitrate" has also been noted as a weakness of the *Employment Protocol.* [443] It should be noted here that an evolution has occurred in the drafting of the protocols regarding this issue. The *Consumer Protocol* which followed the *Employment Protocol* provides much more detail regarding the steps that a provider of goods and services should take to facilitate knowing consent to the arbitration clause.[444]

Finally, the *Employment Protocol* has been criticized because it does not give the employee enough information about the potential arbitrators. In that regard, it has been found that the information available to the employee in a non-union arbitration fails to "replace the institutional memory that an employee loses when he or she is not represented in the arbitration process by a labor union."[445]

The concerns raised by Professor Green and others regarding the *Employment Protocol*'s treatment of pre-dispute arbitration clauses and the adequacy of its standards reflects a fundamental concern regarding the use of privately promulgated standards: "Most private standards are 'consensus' standards . . . . This process seems practically designed to ensure that standard-setters follow the path of least resistance. The need for consensus . . . leads to a 'watering down' of many standards."[446] The due process protocols are clearly consensus-based standards.[447] The drafters of the *Employment Protocol* were candid about the difficulty they had regarding the appropriateness of pre-dispute arbitration provisions and explicitly stated

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[441] *See also Arbitration: Attorneys, Arbitrators Mull Arbitrator's Role in Case Where Claimants Have No Counsel*, 32 DAILY LAB. REP. (BNA) C1 (Feb. 16, 2000) ("A flaw in the arbitration protocol, according to [Richard T. Seymour, director of the Employment Discrimination Project at the Lawyer's Committee for Civil Rights Under Law] is that it does not bar the imposition of costs on claimants far greater than the costs they would have to pay if they took their claim to court.").

[442] Stone, *supra* note 54, at 1046.

[443] FitzGibbon, *supra* note 141, at 227.

[444] *See supra* notes 211–13 and accompanying text.

[445] Bingham, *supra* note 370, at 119.

[446] Gunningham & Rees, *supra* note 299, at 372 (citing ROSS CHEIT, SETTING SAFETY STANDARDS: REGULATION IN THE PUBLIC AND PRIVATE SECTORS 176 (1990)).

[447] *See, e.g.*, Stone, *supra* note 54, at 1045 ("The Due Process Protocol thus appears to represent a consensus within the labor-management community about fair procedures for employment arbitrations.").

that the task force was unable to achieve a consensus on that issue.[448] The result of the failure to reach a resolution of this issue, however, allowed the status quo to continue even in the face of significant opposition to the use of pre-dispute arbitration clauses in employment agreements, voiced by, among others, the Dunlop Commission and the EEOC. The status quo clearly favored the arbitration service industry.

Thus, it is clear that when confronting the most difficult policy issues—issues of national importance—self-regulation, even when engaged in by a group representing diverse interests, is of limited utility.[449]

While differences of opinion exist as to what the actual standards of due process should be in the protocols, and while the standards are undeniably "consensus" standards, achieving a consensus on a single set of standards still has value for a number of reasons. "[S]ince the *Gilmer* decision, some consensus has evolved as to the elements and standards of fair process for the binding arbitration of discrimination claims."[450] That consensus is capable of exerting pressure on those involved in the arbitral process to conform their behavior: "A code of conduct—even if only morally binding—can be expected to exert a powerful constraining influence on the behavior of would-be defectors."[451] In addition, promulgation of a single set of standards drafted by a diverse group of persons is also essential in getting commitments to follow those standards: "[W]hen there is a multiplicity of standards, there is effectively no standard at all, because no firm can be confident that its competitors are playing by the same rules."[452] A common code will make firms more willing to adhere to it because they arguably are not putting themselves at a competitive disadvantage by following rules more stringent than those followed by others in the industry.

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[448] *See Employment Protocol*, *supra* note 1, at 172. The drafters of the *Consumer Protocol* were likewise unsuccessful; Stipanowich, *supra* note 130, at 12. As previously mentioned, only the drafters of the *Health Care Protocol* were more successful: "In disputes involving patients, binding forms of dispute resolution should be used only where the parties agree to do so after a dispute arises." *Health Care Protocol*, *supra* note 2, at *Principle 3*.

[449] Members of Congress have attempted on numerous occasions to prohibit the use of pre-dispute arbitration clauses. For example, Senator Feingold has proposed bills, which would prohibit the use of pre-dispute arbitration clauses in employment agreements and in consumer credit transactions. *See* Civil Rights Procedures Protection Act, S. 163, 107th Cong. (2001); Consumer Credit Fair Dispute Resolution Act of 2002, S. 1117, 107th Cong. (2001). Those bills, like the rest of the proposed legislation seeking to make changes to the law and practice of arbitration on the federal level, have not yet passed.

[450] FitzGibbon, *supra* note 141, at 243.

[451] Maitland, *supra* note 261, at 138.

[452] *Id.*

The common standards are also important because, as their drafters recognized, they represented a first step in the evolution of arbitral due process standards.[453] As a first step, they began the formal dialogue regarding the standards necessary to ensure a fundamentally fair process for those lacking bargaining power over the arbitration clause. Those standards have been used to guide both courts and legislatures. The providers who endorsed the protocols also committed themselves to adhering generally to due process standards, in whatever form they are articulated. Accordingly, those providers have revised their rules to reflect the evolution in due process standards as crafted by the courts called upon to determine the validity of an arbitration scheme.[454] Because of this practice, those advocating the use of arbitration for certain types of disputes also advocate that the arbitration be conducted pursuant to the rules of one of the key arbitration service providers;[455] by providing for arbitration administered by an organization that adheres to due process standards, challenges to the arbitration provision may be avoided or minimized.

While providers have attempted to amend their rules to reflect certain changes in the due process standards articulated by the courts, it is time for the protocols to be revisited if they are to continue to be a legitimate tool of self-regulation. The protocols need to be amended, not only to include monitoring and enforcement provisions, but also to reflect current law and practices. Certain current issues in arbitration need to be vetted by a diverse group of stakeholders to determine appropriate standards. Although the point of this Article is not to critique each of the standards contained in the protocols, it is nonetheless clear that, putting aside the issue of the use of pre-dispute arbitration clauses,[456] the standards can be improved.

For example, the protocols do not do an adequate job regarding the controversial issue of repeat players. Commentators believe that repeat

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[453] *See supra* note 238; *see also* Stipanowich, *supra* note 130, at 13 (noting that the *Consumer Protocol* is not an "endpoint" in the evolution of arbitral standards).

[454] Neesemann, *supra* note 196, at 16 (noting that arbitration service providers "strive to keep their guidelines and/or rules up to date with the shifting legal terrain" and providing two examples: the revision of JAMS's employment guidelines in response to the *Armendariz* case and the revision by the AAA of its consumer rules in response to *Green Tree*).

[455] *Id.*; *see also*, Alan S. Kaplinsky & Mark J. Levin, *Anatomy of an Arbitration Clause: Drafting and Implementation Issues Which Should be Considered by a Consumer Lender*, 1172 PLI/Corp 17, 19 (2000) ("In developing an arbitration program, consideration should be given to 'A Due Process Protocol for Mediation and Arbitration of Consumer Disputes.'").

[456] This issue is "put aside" because it is unlikely that the status quo will change without congressional action.

players do better in arbitration than one-shot or incidental players.[457] The protocols provide no mechanism for alerting a party to the fact that the other party may be a repeat player nor does it provide a remedy in the event that a party is a repeat player.[458] Disclosure of the relationship between the provider and the parties, whether formal or informal, must be required, and, in the event one party is deemed a repeat player or has a significant relationship with the provider that produces the appearance of partiality, the non-repeat player must be given the option of using an alternative arbitration service provider, or the judicial forum.

The protocols also need to be amended regarding costs. It is clear that in, among other things, the employment and consumer context, the costs associated with bringing a claim in an arbitral forum can be prohibitively high.[459] Although some providers have rules permitting the waiver of certain costs if a party is unable to pay or require the employer to pay certain expenses incurred in the arbitration,[460] such rules are not required by the protocols. Accordingly, the due process protocols should be amended to explicitly require that the party imposing arbitration bear the costs associated

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[457] *See, e.g.*, Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMP. RTS. & EMP. POL'Y J. 189, at 190–91 (1997). *But see* Ware, *supra* note 362, at 751–53 (questioning whether the repeat-player effect is present in cases comparable on the merits, and asserting that "too much" is made of the repeat-player effect).

[458] Disclosure of the relationship, whether formal or informal, between an arbitration service provider and a party is required in the CPR-Georgetown Commission on Ethics and Standards of Practice in ADR. *See Principles for ADR Provider Organizations*, *supra* note 305, at 994–95.

The AAA "declined to fully endorse" the Provider Principles, even though it endorsed the "basic premises of the Principles which encourages transparency and disclosure." *Id.* at 984 n.5.

[459] *See, e.g.*, Green Tree Fin. Corp. v. Randolph, 531 U.S. 79, 90 (2000) (recognizing that "large arbitration costs could preclude a litigant . . . from effectively vindicating her federal statutory rights in the arbitral forum); *In re* Knepp, 229 B.R. 821 (Bankr. N.D. Ala. 1999) (mem.) (holding that arbitration provision unconscionable when consumer unable to pay fees and costs of arbitration); Rhode v. E & T Inv., Inc., 6 F. Supp. 2d 1322, 1327 (M.D. Ala. 1998) (mem.) (holding that unconscionability may be found if showing made that costs of arbitral forum render party unable to pursue remedies); Brower v. Gateway 2000, Inc., 676 N.Y.S.2d 569, 574 (N.Y. App. Div. 1998); (holding that excessive costs associated with arbitrating consumer claim before International Chamber of Commerce rendered arbitration provision substantively unconscionable); Teleserv. Sys., Inc. v. MCI Telecomm. Corp., 659 N.Y.S.2d 659, 664–65 (N.Y. App. Div. 1997) (holding that arbitration provision requiring excessive filing fee unconscionable on its face); Williams v. Aetna Fin. Co., 700 N.E.2d 859, 866–67 (Ohio 1998) (holding that excessive costs rendered clause unconscionable).

[460] *See, e.g.*, AAA's National Rules for the Resolution of Employment Disputes, *available at* http://www.adr.org. (last visited Sept. 13, 2003).

with it. The concern raised by those imposing arbitration that frivolous claims will be brought if costs are not shared between the parties seems highly unlikely and nevertheless can be addressed in other ways.[461] The protocols should also set up standards requiring the provider to facilitate the payment of costs to the arbitrator so that the arbitrator is not made aware of how the costs are allocated.

Conflicts of interest remain a serious concern to those compelled to go to arbitration. The protocols require impartial and neutral arbitrators. Certain relationships between an arbitrator and a party must be disclosed and if such disclosure suggests a conflict of interest, the arbitration cannot continue unless the party has consented to the potential conflict of interest. However, the sufficiency of the "disclose and consent" approach has been questioned, particularly in the context of an arbitration which occurs because it was imposed upon a party in a contract of adhesion.[462] In that case, the argument has been made that certain conflicts of interest should be non-waivable or non-consentable.[463] Accordingly, the protocols need to be revised to identify those conflicts that should lead to automatic disqualification of an arbitrator or provider.

The use of classwide arbitration, particularly in the context of consumer claims, needs to be addressed in the protocols and the effect of arbitration clauses that attempt to bar claimants from proceeding as a class needs to be resolved. Accordingly, it is imperative that major stakeholders, including consumers and employees, the arbitration industry, and providers of goods and services, carefully examine the myriad of issues and develop standards regarding the circumstances when class action arbitration may be desirable.[464]

Because the protocols were crafted by persons representing diverse interests in arbitration, they are able to somewhat overcome the credibility problem usually associated with industry self-regulation. However, the protocols are nonetheless consensus standards and, for that reason, they are not as stringent as they could be. Nevertheless, such consensus standards have value in articulating a code of conduct that is capable of exerting

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[461] It has also been argued that arbitrator impartiality may be impacted if the drafting party is required to pay the costs of the arbitrator. At least one court has rejected that argument. *See* Cole v. Burns Int'l Sec. Serv., 105 F.3d 1465, 1485 (D.C. Cir. 1997).

[462] Menkel-Meadow, *supra* note 185, at 960–61.

[463] *See id.*

[464] *See generally* Jean R. Sternlight, *As Mandatory Arbitration Meets the Class Action, Will the Class Action Survive*, 42 WM. & MARY L. REV. 1 (2000) (discussing the clash between binding arbitration and class action procedure and detailing the restrictions on the use of arbitration clauses to abolish class actions and the limits to and the desirability of class action arbitration).

pressure on those subject to it to conform their behavior accordingly. Still, the impact of the protocols can be greater if the protocols are revisited to address certain issues in the context of the fact that much of the arbitration to which the protocols relate comes about through the inclusion of pre-dispute arbitration clauses in contracts of adhesion.

The kind of self-regulation that has taken place in the arbitration industry has undeniably had a positive impact on the arbitration of employee and consumer disputes. The role such self-regulation on a business-wide basis can have on issues of national importance is, however, limited. Federal congressional action on those issues is needed; industry self-regulation, even when conducted in the manner connected with the drafting of the protocols, is incapable of adequately handling those issues.

IV. CONCLUSION

The need to regulate the arbitration industry became acute after the Supreme Court's decision in *Gilmer* and the judicial and administrative systems' failure to provide affordable access to justice for the growing number of employment discrimination claims. The protocols are a commendable attempt at self-regulation. The existence of the protocols has transformed the role of arbitration service providers. Instead of merely administering a case as set forth in the arbitration clause, the industry, because it has committed itself to the protocols, now reviews those clauses to make sure they conform to the due process standards articulated in the protocols and incorporated into their rules. Prior to that adoption and incorporation, obtaining a court order was the only avenue available to a person subjected to a one-sided arbitration agreement to challenge the agreement. Now, the providers perform the role as gatekeeper and decline to administer claims that do not meet due process standards. That alone has had a significant impact on the practice of arbitration and the preservation of certain rights of individual claimants, including employees and consumers. As long as all providers equally perform that role, the procedural playing field can be leveled for employees, consumers, and others forced to go to arbitration pursuant to a mandatory pre-dispute arbitration agreement.

The model used in crafting the protocols, where numerous persons with diverse interests participated in the process, and the incorporation, to some extent, of the time-tested labor arbitration procedures, save the protocols from falling into the category of "sham" industry standards. However, the protocols contain two weaknesses that seriously undermine their effectiveness: (i) the lack of any mechanism for monitoring compliance therewith, and (ii) the failure to provide for sanctions for those who fail to abide by their agreement to follow the due process standards contained in the

protocols. Efforts should be undertaken to ensure that all arbitrators and providers, particularly those who are not affiliated with a major arbitration service organization, commit to adhering to the principles set forth in the protocols. The commitments of all should be monitored and the monitoring entity should have the authority to enforce adherence to the protocols. While various options exist to fulfill the need for policing and enforcement, the ideal option would be the creation of an oversight entity which would include, at a minimum, the stakeholders most affected by pre-dispute arbitration clauses: employees, consumers, and patients.

While the standards of due process required in the arbitral forum are evolving, the protocols began the process and achieved the promulgation of standards much more quickly than could have been achieved on an ad hoc basis by the courts when determining the enforceability of an arbitration clause,[465] or has been achieved by Congress since the *Gilmer* decision.

The protocols have not, however, eliminated the need for legislation governing arbitration. One of the limits of self-regulation and its reliance on consensus standards as the industry standard is apparent in the *Employment* and *Consumer Protocols*, which failed to reach consensus on the appropriateness of mandatory pre-dispute arbitration clauses. That issue, regarding the use of pre-dispute arbitration clauses as a condition of employment or as a condition of obtaining a consumer good or service, still needs to be addressed by Congress. Significant differences of opinion exist as to this issue and the collective judgment of Congress is needed to resolve the issue so that the interests of the public are achieved. In addition, congressional action is also needed if it is in the public's interest to offer disputants more than minimum standards in the arbitral forum.

Congressional action is also needed to ensure that all providers of arbitration services adhere to the protocols and may also be necessary if the industry is unable to effectively monitor its commitment to the protocols or if it fails to adequately enforce the commands of the protocols. If the arbitration industry is incapable of resolving due process issues not addressed by the protocols,[466] or if it does not respond to the judiciary's pronouncements of due process standards, Congress may also need to step in to provide the appropriate command and control legislation. Finally, congressional action may be desirable in order to have "one voice" speak as to the necessary due

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[465] *Cf.* Gorman, *supra* note 14, at 681 (noting that it may be more efficient for Congress to pass legislation regulating arbitration of statutory employment disputes, which would "rationalize and speed up the process that would otherwise take the courts many years (if not decades) to complete").

[466] *See* Neesemann, *supra* note 196, at 16 (noting that the due process standards of the arbitration service providers do not address, among other things, the shortening of the statute of limitations).

process standards for arbitration of statutory disputes. In some instances, the courts and the protocols have been at odds regarding the standards that must exist for the arbitration agreement to be enforceable.[467] Multiplicity of standards may undermine the industry's attempt at self-regulation and confusion is created that ultimately will lead to additional litigation between the parties to an arbitration agreement, precisely the action that the arbitration industry seeks to avoid.

[467] *See supra* notes 460–61 and accompanying text (discussing the issue of allocation of costs in employment arbitration); *see also* Great Western Mortgage Corp. v. Peacock, 110 F.3d 222, 232 n.42 (3d Cir. 1997) (court compelled arbitration after JAMS refused to arbitrate because "Great Western's arbitration policy failed to meet JAMS's standards of procedural fairness").